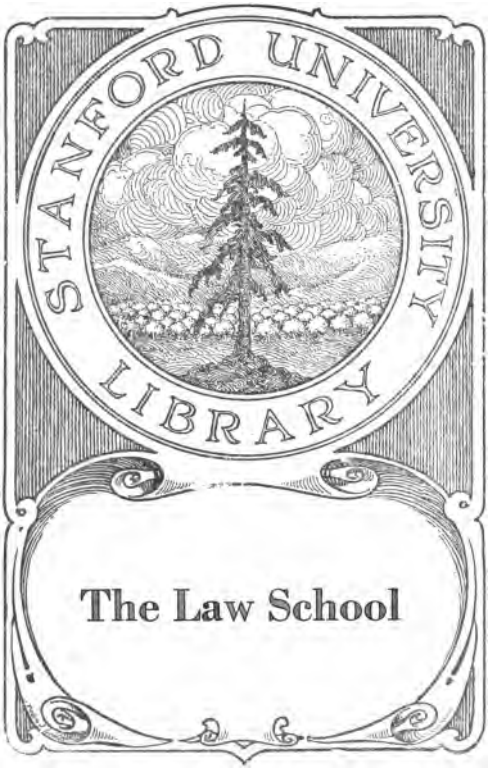
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Report

of the

Attorney General

of the

State of Colorado

for the

Years 1905 and 1906

N. C. Miller
Attorney General

Denver, Colorado
The Smith-Brooks Printing Company
1906

Attorneys General of Colorado

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Biennial Report of the

ATTORNEY GENERAL

of the

State of Colorado

DENVER, November 15, 1906.

To the Honorable,

JESSE F. McDONALD,
Governor of the State of Colorado.

Sir—In compliance with the constitutional and statutory requirements of the State of Colorado, I beg leave to submit a report of the official conduct of the office of Attorney General from the 10th day of January, 1905, to the 15th day of November, A. D. 1906.

I submit herewith a complete list of criminal and civil cases pending in the various courts in which this office appeared for the State or its officers.

The opinions contained in this report do not include all that have been written during the biennial period. I have endeavored to select such as will be of more or less use hereafter, and have omitted those which have only a passing value.

A great many requests for opinions have been made by persons not entitled to receive them. These have been refused, except in a few cases. There is no law requiring the Attorney General to furnish opinions to persons other than State officers, the Legislature and State institutions.

The work of this office has been largely increased in recent years, owing to legislation which has cast additional burdens upon it. It is no longer true that the criminal work is the most important or the most laborious. The work that requires the most time relates to the civil law. For instance, the Revenue Act imposing the inheritance tax has made an immense amount of labor for this office, and vexatious questions are raised for which there is often no precedent. Although the law imposes no duty on this office to look after the collection of the inherit-

ance tax, yet the Governor has the right to direct the Attorney General to take care of all suits in which the State has an interest, and this has been done by a written order. Unless an issue is raised concerning the payment of the tax, there is no suit and we are not authorized to look into the matter.

In my judgment, the inheritance tax is becoming too large and important to be handled in this way. There has already been collected $126,214; during my term of office, a judgment has been obtained against the Stratton estate for $284,064.33, with interest from the 14th day of September, 1902, until paid. The accumulated interest now amounts to about $76,000. The latter item is disputed by the executors and it is possible a writ of error will be sued out to test the validity of the judgment directing the payment of interest. The bookkeeping and auditing department of the State is in the Auditor's office, and my judgment is that a clerk should be provided who has authority to examine all papers and inquire into all proceedings concerning the inheritance tax, and when matters appear which should be litigated the Auditor has authority to call upon the Attorney General to represent the State. It would not be just to require the Attorney General's office to look into mere matters of routine; this detail work can be done better by the Auditor's office. In one or two instances, mistakes have been discovered which would more than pay the salary of such employe. How many more mistakes exist throughout the State undiscovered, I am unable to report. The law, as it now stands, imposes some duties upon county judges, district attorneys and county treasurers in the collection of this tax. Experience shows that the State's interests can not be properly looked after by local officials. Where the State has a large interest, it should have its own representative to look after it in one of the executive offices. The administration of the law relating to inheritance taxes has raised many difficult and intricate problems concerning which no precedents are found.

During this biennial period the Supreme Court has decided that each heir of the first class should have an exemption of $10,000. A similar decision was rendered in the State of New York, and soon thereafter legislation was adopted making it clear that only one exemption of $10,000 should be deducted from the entire estate. If this is the desire of our Legislature, a similar measure should be enacted.

The increasing value of lands, as well as their growing scarcity in Colorado, has made the duties of the State Board of Land Commissioners more exacting and difficult to discharge. Four years of experience as a member of this Board has impressed upon me the importance of doing the work in that office well. I do not believe that any private individual would undertake to deliver so many important papers affecting titles to land, unless the documents were examined by a competent attorney. We have employed a special counsel at $1,500 a year,

but I believe the efficiency of this counsel would be improved by putting him under the direct control and supervision of the Attorney General. I may say that I am opposed to the present plan.

The legal work connected with the land office and the collection of inheritance taxes will afford all the labor that one good attorney can possibly do well. Leaving these out of consideration, the Attorney General's office has the additional work growing out of the department of irrigation added to the Engineer's office, and the collection of corporation taxes devolving upon the Secretary of State. This extra work, along with the work that has always been heretofore in the Attorney General's office, will be all that he and two assistants can accomplish.

The care of the public lands of the State is increasing each year. I do not believe the subject receives the attention it requires from the executive officers composing the State Board of Land Commissioners. It may have been all right to form this Board from the executive officers at an early date, but the growth of business in all the departments of the State has increased so that these officers are not able to give the business the attention it deserves. It would add very little to the cost of the management of the Land Office to constitute a board of three, who would give their entire time and attention to the affairs of this department. For instance, the register now receives a salary of $3,000, and a deputy register $1,800, and a chief appraiser is paid $1,500. If a new board were made up of these three persons at a salary of $3,000 a year, the gain to the State would far exceed the increased cost to the people. The additional expense would be $1,200 in the case of the deputy register and $1,500 in the case of the chief appraiser, or, altogether, an increased expenditure of $2,700. The interests of the people would be better looked after. I have no doubt that the revenues of this office would be greatly increased and its efficiency improved if the Board could give the subject its entire attention. We have discovered in many instances that valuable tracts of land were being rented for a nominal sum, and have raised the rental. I have no doubt that many instances of this kind exist which have not come to the knowledge of the Board. I think that a constitutional amendment should be submitted to the people creating a land board of three members, giving them entire charge of the business of that office. The efficiency of the office will be improved without additional expense.

The lands of the State must be protected in regard to water, and how this can be done must be determined by inspection. This question is of such great importance that it can not be longer deferred unless the public lands of the State are to be rendered valueless. I think I can safely say that the Board, made up of executive officers, as it now is, has almost no knowledge of the physical condition of particular tracts of land. It is therefore impossible for the Board to deal with the question of irriga-

tion, and yet this problem must be solved in order to protect the value of these lands.

I believe that the new board should have a term of at least six years, and one member go out every two years. This would result in a majority of the board always having some knowledge of the business of the office. There are some counties in the State where the quantity of State lands is an impediment to the development of the county. These lands do not bear a proportionate share in the expense of maintaining county roads, public schools and courts of the county. Whatever profit is derived from the lands is paid into the State treasury, and is distributed throughout the State in proportion to the school population. The large cities derive the greater share of it, while the small counties where it is situated bear all of the burden of protection. I am convinced that the question of managing the State lands is of such vast importance that it should be submitted to a board who can give it entire attention.

On February 10, 1903, a suit was commenced in the District Court of the city and county of Denver to enforce the collection of the State license tax imposed on corporations. This suit is now pending in the Supreme Court of the United States on a writ of error taken out by the American Smelting and Refining Company. It has been set for argument on the 17th day of December, and will be disposed of before my term expires.

It has been impossible to collect this tax from corporations who saw fit to decline to pay, for the reason that the suit has been looked upon as a test case to settle the constitutionality of the law. Since the 22d day of March, 1902, there has been collected from corporations for the State license tax the sum of $231,706.97.

The law framed for the organization of corporations was adopted at a time when they were not so important as they are to-day. Few corporations had a capital of a million dollars at the time the legislation was enacted. The growth of these concerns is so large to-day that it is safe to say that 80 per cent. of the business is conducted by them. This is the statement made by one of the federal judges.

The articles of incorporation filed with the Secretary of State under the general laws constitute a contract between the State and the company. There is no supervision on the part of the People as to those instruments. The statutes define what the articles of incorporation of various companies shall contain and what the limitations on their powers shall be, but there is no machinery provided by statute to enforce compliance with these laws.

A corporation organized for mercantile business may attempt to "ring in" a clause allowing it to do a banking business. A mining company may attempt to include a franchise to build a railroad. In fact, an examination of the articles of incorporation in the office of the Secretary of State will show that some

of them include almost everything within the field of business. The State is the loser of large sums of revenue by this policy, and the rights of the People themselves are not protected. Moreover, the statutes governing the organization of railroads are entirely different from those concerning mining corporations.

I would therefore recommend that a statute be adopted requiring the articles of incorporation to be submitted to the Attorney General for approval before they shall be filed by the Secretary of State.

During the last session of the Legislature a bill was drawn up to authorize the Governor to examine, personally or by his agent, the books and finances of every department and bureau of the State of Colorado. The measure fell by the wayside for want of time for its consideration. The lack of such power on the part of the Governor, except in the case of the offices of the Treasurer and Auditor, was passed upon in an opinion signed by Hon. Calvin E. Reed and myself. We jointly made a thorough examination of the law at the request of Governor Peabody, and united in the opinion that the Governor does not now possess the authority to examine the books and finances of the different bureaus and departments.

The statutes of the State of Colorado are almost destitute of any legislation on the subject of trusts and unlawful combinations. It is true that there are constitutional restrictions, but these provisions are not supported by any statutory legislation. Almost every state in the Union has adopted some laws on the subject which enable the Attorney General to make the proper investigations and take the necessary steps to determine such unlawful combinations. There is not even a statute in the State of Colorado authorizing the Attorney General to begin a *quo warranto* proceeding. In this respect the office is entirely subordinate to the district attorney. This should no longer continue, but an appropriate statute should be adopted giving the Attorney General, who represents the entire People, power to begin a *quo warranto* proceeding when, in his judgment, it is deemed necessary, or when he is ordered so to do by the Governor. I think this statute should be in the alternative. I find it so in most of the states. This statute should also be supported by proper legislation, defining trusts and unlawful combinations, and imposing proper penalties and authorizing legal proceedings to be taken for their enforcement.

The corporation laws should be amended so as to require all domestic corporations to have at least one resident director, or else appoint an agent in the State upon whom legal process can be served. It is possible, under the laws of Colorado, to organize a domestic corporation and have all the directors nonresidents and thus evade the service of any process in the State of Colorado. In this respect, the legislation of this State is far behind that of other States.

The case of *Dobbins vs. Colorado Southern Railway Co.*, 19 Colo. App., 257, discloses the necessity of additional legislation as a means of settling revenue disputes between boards of county commissioners and railroads. I think a statute should be adopted authorizing boards of county commissioners in their discretion to direct the county attorney to sue delinquent tax payers in an action of debt. Distraint is not always a feasible remedy, and in the case of railroads, it has been denied to be a valid remedy.

The anomaly exists in Colorado to-day allowing railroads to refuse to pay their taxes without affording an adequate remedy to enforce payment. There is scarcely any property within the county, owned by a railroad, which can be seized under a distraint warrant. It has even been held that safes are exempt from levy, because they are used in interstate commerce. It is true that the issuance of an execution upon the judgment would require the seizure of the property, but the difficulty will not arise in this manner. If a judgment is once obtained, it will be voluntarily paid. The trouble about the present law is that a county can not begin a proper form of action to settle the dispute. The difficulty is in finding an action which can be commenced.

The argument in the Kansas-Colorado case has been set for the 17th of December, 1906. It will not be in good taste to attempt to forecast the outcome. Considering the magnitude of the case, it has been handled with dispatch, and it has received the constant care of myself and associates. I expect to file a supplemental report after the argument.

It has been impossible to agree upon a stated compensation for the attorneys employed. I have no hesitation in saying that this suit has probably required more time from the attorneys than any other litigation in which they have been engaged. The territory to be covered has been new and no precedents in point could be found; the work has required original thought throughout. An additional appropriation will be necessary to settle with the counsel who have devoted themselves so assiduously to the care and preparation of this suit.

I have paid less attention to the trial of criminal cases in the Supreme Court during my second than during my first term. This result has been forced by different conditions. The chief cause has been the great amount of time required to take care of the appeal in the revenue case against the American Smelting and Refining Company. There have been no assistants employed in this suit, and the nature of it has required an examination of all the important opinions bearing upon the subject. Then the supervision of the litigation in the Kansas-Colorado suit has taken up a great deal of time.

I believe the Attorney General and his assistants would find very much more time to devote to the business of the office if district attorneys were encouraged to follow up cases taken from the trial courts to the Supreme Court on writs of error.

There are good reasons to be urged in favor of this plan. The most obvious argument in its favor is the familiarity acquired with the case by the attorneys in the trial court. The district attorney is paid a salary of $800 a year out of the State treasury. The greatest difficulty in securing the services of the district attorney grows out of the fact that the county is not authorized to compensate him for his expenses in attending the Supreme Court. I think that a statute should be passed authorizing the board of county commissioners to pay him his necessary expenses in following these cases to the Supreme Court. In almost all states of the Union, the prosecuting attorney appears in the case in the Supreme Court. There is certainly little incentive for any one in the Attorney General's office to pore over a record which he had no part in making, and possibly has no sympathy with the errors that are apparent. The attorney who is responsible can probably maintain the correctness of the record better than a stranger, and he would probably have more heart in the work. Some of these cases have a record so large that it takes a month for a person in the Attorney General's office to become familiar with it. When the case is finished in the District Court, the district attorney is already more familiar with the record and evidence than the assistants in the Attorney General's office can ever hope to be. I would, therefore, earnestly recommend that the Legislature authorize the counties to pay the district attorney his expenses in following cases from his county to the Supreme Court.

I have covered these matters in my report for the reason that it is the duty of an Attorney General who has served four years in the office to give the chief executive of the State and the People whatever information he has obtained concerning the deficiencies in the laws, and to point out whatever difficulties there may be in the protection of their rights.

Respectfully submitted,

N. C. MILLER,
Attorney General.

APPENDIX

List of Cases Pending and Disposed of During 1905 and 1906

Opinions Rendered for Same Period

U. S. SUPREME COURT.

Docket No.	Title of Cause.	Briefed by.	Status of Case.
3	Kansas vs. Colorado	Attorney General Miller, Mr. Melville, Mr. Ramsey	At issue
	Am. S. & R. Co. vs. People	Attorney General Miller	At issue
	Patterson vs. People	Attorney General Miller, Mr. Melville	Pending

U. S. CIRCUIT COURT.

Docket No.	Title of Cause.	Briefed by.	Status of Case.
4475	People vs. A. T. & S. F. Ry	Attorney General Miller	
4506	People vs. C. B. & Q. Ry	Attorney General Miller	
4704	Moyer vs. Peabody et al	Attorney General Miller	Pending
4788	People vs. Pullman Co	Attorney General Miller	Pending

IN THE SUPREME COURT, STATE OF COLORADO.

(Criminal Cases.)

Docket No.	Title of Cause.	Briefed by.	Status of Case.
3130	Van Meter et al. vs. Bass	Mr. Melville	At issue
4732	Lynch vs. People	Mr. Melville	Disposed of on merits
4748	Grundel vs. People	Mr. Melville	Disposed of on merits
4753	Donaldson vs. People	Mr. Melville	Disposed of on merits
4790	Roland vs. People	Mr. Melville	Disposed of on merits
4793	Jones et al. vs. People	Mr. Melville	Disposed of on merits
4796	Schutte vs. People	Mr. Melville	Disposed of on merits
4797	Zipperian vs. People	Atty. Gen. Miller	Disposed of on merits
4801	Andrews vs. People	Atty. Gen. Miller	Disposed of on merits
4802	Arnold vs. People	Atty. Gen. Miller	Disposed of on merits
4839	Boles vs. People	Mr. Melville	Disposed of on merits
4840	Glover vs. People	Mr. Ramsey	Pending
4845	Tuttle vs. People	Mr. Melville	Disposed of on merits
4866	Trask vs. People	Mr. Melville	Disposed of on merits
4923	Greenwood vs. People	Mr. Ramsey	Disposed of on merits
4942	Shieferdecker vs. People	Atty. Gen. Miller	Dismissed on pardon
4956	Burns et al. vs. People	Atty. Gen. Miller	Dismissed on motion
4957	S. C. Wilson vs. People	Mr. Melville	Disposed of on merits
4959	Trine vs. People	Mr. Ramsey	Disposed of on merits
4973	Sonnanstine vs. People	Mr. Ramsey	Dismissed on motion
4974	Covington vs. People	Mr. Melville	Disposed of on merits
5628	Miller vs. People	Mr. Melville	Dismissed on motion
5629	Miller & Dowd vs. People	Mr. Melville	Dismissed on motion

IN THE SUPREME COURT, STATE OF COLORADO.

(Criminal Cases.)

Docket No.	Title of Cause.	Briefed by.	Status of Case.
5647	Edna May vs. People	Mr. Ramsey	Dismissed on motion
5649	Perry Bros. vs. People	Mr. Ramsey	Disposed of on merits
5656	Leavell vs. People	Mr. Ramsey	Dismissed on motion
5657	E. H. Wilson vs. People	Mr. Melville	Disposed of on merits
5667	A. H. Smith vs. People	Mr. Melville	Disposed of on merits
5681	People vs. Patterson et al	Atty. Gen. Miller, Mr. Melville, Mr. Ramsey	Error to U. S. Sup. Ct.
5683	Amoldson vs. People	Mr. Ramsey	Dismissed on motion
5685	Brennan vs. People	Mr. Melville	Disposed of on merits
5793	Griffin vs. People	Mr. Ramsey	Pending
5794	E. M. Johnson vs. People	Atty. Gen. Miller	Disposed of on merits
5806	Burnside vs. People	Mr. Ramsey	At issue
5814	Horton vs. People	Attorney General Miller	Pending
5820	Ellis vs. People	Attorney General Miller	Pending
5825	Pennington vs. People	Mr. Melville	Dismissed on motion
5828	Decker vs. People	Mr. Melville	Dismissed on motion
5831	Steele vs. People	Mr. Ramsey	At issue
5834	Gibbs vs. People	Atty. Gen. Miller	Disposed of on merits
5835	Larson vs. People	Mr. Ramsey	Dismissed on motion
5843	Scott vs. People	Mr. Melville	Dismissed on motion
5890	Smith & Fightmaster vs. People	Mr. Melville	At issue
5892	Imboden & Hill vs. People	Attorney General Miller	Pending
5895	Warford et al. vs. People	Attorney General Miller	Pending
5896	Warford vs. People	Attorney General Miller	At issue
5904	Hiller vs. People	Attorney General Miller	Pending
5905	Stubbs vs. People	Mr. Melville	Pending
5909	Gibson vs. People	Attorney General Miller	Pending
5910	Anna Wilson vs. People	Attorney General Miller	Pending
5915	Keefe et al. vs. People	Atty. Gen. Miller	Disposed of on merits
5927	Sage vs. People	Mr. Ramsey	At issue
5961	Asmussen vs. People	Mr. Ramsey	At issue
5978	Morse vs. People	Mr. Melville	Disposed of on merits
5979	Morse vs. People	Mr. Melville	Disposed of on merits
6006	Phillips et al. vs. People	Mr. Melville	Pending
6009	McQueary vs. People	Attorney General Miller	Pending
6030	Burcher et al. vs. People	Mr. Melville	Pending
6104	Wickham vs. People	Mr. Melville	Pending
6109	Adamic vs. People	Mr. Melville	Pending
6110	De Kelt vs. People	Attorney General Miller	Pending

IN THE SUPREME COURT, STATE OF COLORADO.

(Civil Cases.)

Docket No.	Title of Cause.	Briefed by.	Status of Case.
4593	Crouter vs. Bennett	Atty. Gen. Miller	Disposed of on merits
4796	Am. S. & R. Co. vs. People	Attorney General Miller	Appealed to U. S. Sup. Ct.
4831	Bell & Wells vs. People	Mr. Melville	At issue
4884	Co. Commrs. vs. Strait	Atty. Gen. Miller	Disposed of on merits
4906	People vs. Dist. Ct.	Mr. Melville	Writ granted
4907	People vs. Dist. Ct.	Mr. Melville	Writ granted
4912	Hartman vs. Tresise	Mr. Melville	Disposed of on merits
4588	Martin vs. Dist. Ct.	Mr. Melville	Disposed of on merits
4589	Martin vs. Dist. Ct.	Mr. Melville	Disposed of on merits
5132	Martin vs. Dist. Ct.	Mr. Melville	Disposed of on merits
4930	People vs. Tool et al.	Atty. Gen. Miller	Disposed of on merits
5651	People ex rel. vs. Cornforth	Atty. Gen. Miller, Mr. Ramsey	Disposed of on merits
5782	Higgins vs. St. Med. Bd.	Mr. Melville	At issue
5832	People vs. Koenig, Admx.	Mr. Ramsey	Disposed of on merits
5887	In re Geo. Stidger vs. Johnson	Mr. Ramsey	Disposed of on merits
5917	Fitzell vs. People	Mr. Melville	At issue
6005	Doherty vs. People ex rel.	Mr. Melville	Pending
6112	People ex rel. vs. Grimes	Mr. Melville	Disposed of on merits

COURT OF APPEALS CASES DISPOSED OF DURING TERM.

Docket No.	Title of Cause.	Briefed by.	Status of Case.
2631	Fitzpatrick vs. People	Mr. Ramsey	Disposed of on merits
2786	People vs. J. Johnson. No. 5182 Sup. Ct.	Attorney General Miller	At issue
2900	Holmberg vs. Palmer	Atty. Gen. Miller	Disposed of on merits
3178	Van Meter vs. Bass. No. 3130 Sup. Ct.	Mr. Melville	At issue
3194	Cleghorn vs. S. Impey	Mr. Ramsey	Dismissed on motion
3195	Cleghorn vs. C. Impey	Mr. Ramsey	Dismissed on motion

IN THE DISTRICT COURT.

(Civil Cases.)

Docket No.	Title of Cause.	Briefed by.	Status of Case.
1321	People vs. Hard Land Co.	Atty. Gen. Miller	Disposed of on merits
38284	Tyler vs. St. Bd. Education.	Mr. Melville	Disposed of on merits
	Industr'l School vs. Co. Com.	Mr. Melville	Pending

IN THE DISTRICT COURT.—Continued.
(Civil Cases.)

Docket No.	Title of Cause.	Briefed by.	Status of Case.
	Higgins vs. St. Med. Bd.	Mr. Melville	Disposed of on merits
38936	People vs. Pullman Co.	Atty. Gen. Miller	Trans. U. S. Cir. Ct.
	People vs. B. L. Smith.	Mr. Melville	Dismissed on full payment
	People vs. Mitchell.	Mr. Melville	Dismissed on full payment
39120	People vs. Bryan et al.	Mr. Ramsey	Pending
	People vs. Western L. I. Co.	Attorney General Miller	Pending
39664	People vs. Carroll et al.	Mr. Melville	Dismissed on full payment
372	Brownlee vs. People.	Mr. Ramsey	Dismissed with costs
40120	Bush vs. World's Fair Bd.	Mr. Melville	Pending
	Bush vs. Woodard.	Mr. Melville	Pending
	Col. N. B. vs. Holmberg et al.	Attorney General Miller	Pending
40463	Chenoweth vs. St. Med. Bd.	Mr. Melville	Pending
40474	Burnans vs. St. Med. Board.	Mr. Melville	Pending
40475	Williams vs. St. Med. Board.	Mr. Melville	Pending
40476	Mahon vs. St. Med. Board.	Mr. Melville	Pending
40669	Cook vs. St. Med. Board.	Mr. Melville	Disposed of on merits
	Byal vs. St. Med. Board.	Mr. Melville	Pending
40875	People vs. Bijou Irri. Dist.	Attorney General Miller	Pending

IN THE COUNTY COURT, CITY AND COUNTY OF DENVER.
(Civil Cases.)

Docket No.	Title of Cause.	Briefed by.	Status of Case.
7365	In re Wassenich	Mr. Ramsey	Disposed of on merits
7558	In re Dake	Mr. Ramsey	Disposed of on merits
7663	In re Hughes	Mr. Ramsey	Disposed of on merits
7714	In re Brisbane	Mr. Ramsey	Disposed of on merits
7828	In re Lemen	Mr. Ramsey	Disposed of on merits
7902	In re Cheever	Mr. Ramsey	Disposed of on merits
8113	In re Filby	Mr. Ramsey	Disposed of on merits
8190	In re Westlake	Mr. Ramsey	Disposed of on merits
8226	In re Moore	Mr. Ramsey	Disposed of on merits
8230	In re Seaman	Mr. Ramsey	Disposed of on merits
8386	In re Tuttle	Mr. Ramsey	Disposed of on merits
8408	In re Armstrong	Mr. Ramsey	Disposed of on merits
8446	In re Thomas	Mr. Ramsey	Disposed of on merits
8473	In re Bailey	Mr. Ramsey	Disposed of on merits
8515	In re Malone	Mr. Ramsey	Disposed of on merits

IN THE COUNTY COURT, CITY AND COUNTY OF DENVER.—Cont.

(Civil Cases.)

Docket No.	Title of Cause.	Briefed by.	Status of Case.
8545	In re Gore	Mr. Ramsey	Disposed of on merits
8748	In re Adams	Mr. Ramsey	Disposed of on merits
8757	In re Fehr	Mr. Ramsey	Disposed of on merits
8801	In re Freeman	Mr. Ramsey	Disposed of on merits
8845	In re Bauer	Mr. Ramsey	Disposed of on merits
8959	In re Macomber	Mr. Ramsey	Disposed of on merits
8985	In re Currier	Mr. Ramsey	Disposed of on merits
8973	In re Bradley	Mr. Ramsey	Disposed of on merits
8993	In re Edgar	Mr. Ramsey	Disposed of on merits
9037	In re Frankel	Mr. Ramsey	Disposed of on merits
9049	In re Walsh	Mr. Ramsey	Disposed of on merits
9086	In re Kennedy	Mr. Ramsey	Disposed of on merits
9131	In re White	Mr. Ramsey	Disposed of on merits
9156	In re Crandall	Mr. Ramsey	Disposed of on merits
9164	In re Howard	Mr. Ramsey	Disposed of on merits
9245	In re Lawson	Mr. Ramsey	Disposed of on merits
9296	In re Meyer	Mr. Ramsey	Disposed of on merits
9367	In re Russell	Mr. Ramsey	Disposed of on merits
9425	In re Olson	Mr. Ramsey	Disposed of on merits
9479	In re Melzer	Mr. Ramsey	Disposed of on merits
9569	In re Shaw	Mr. Ramsey	Disposed of on merits
9596	In re Thompson	Mr. Ramsey	Disposed of on merits
9899	In re Clayton	Mr. Ramsey	Disposed of on merits
9713	In re Mason	Mr. Ramsey	Disposed of on merits
9770	In re Murphy	Mr. Ramsey	Disposed of on merits
9893	In re Walsen	Mr. Ramsey	Disposed of on merits
9924	In re Doty	Mr. Ramsey	Disposed of on merits
9940	In re Brannan	Mr. Ramsey	Disposed of on merits
10177	In re Falkenburg	Mr. Ramsey	Disposed of on merits

IN THE COUNTY COURT, COUNTY OF EL PASO.

(Civil Cases.)

Docket No.	Title of Cause.	Briefed by.	Status of Case.
	In re Stratton	Mr. Ramsey	Disposed of on merits

IN THE COUNTY COURT, COUNTY OF WELD.

(Civil Cases.)

728	In re Packard	Mr. Ramsey	Disposed of on merits
747	In re Reinks	Mr. Ramsey	Disposed of on merits

IN THE COUNTY COURT, COUNTY OF WELD.—Continued.

(Civil Cases.)

Docket No.	Title of Cause.	Briefed by.	Status of Case.
770	In re Eaton	Mr. Ramsey	Disposed of on merits
783	In re Mulford	Mr. Ramsey	Disposed of on merits
786	In re Koenig	Mr. Ramsey	Disposed of on merits
787	In re Sanderson	Mr. Ramsey	Disposed of on merits
791	In re Bliss	Mr. Ramsey	Disposed of on merits

IN THE COUNTY COURT, COUNTY OF ARAPAHOE.

(Civil Cases.)

	In re Henry Paul	Mr. Ramsey	Disposed of on merits

IN THE COUNTY COURT. COUNTY OF SAN JUAN.

(Civil Cases.)

	In re Stoiber	Mr. Ramsey	Disposed of on merits

Opinions

APPROPRIATIONS.

The power of the Legislature is plenary over appropriations, except as limited by the Constitution; and there is no constitutional restriction to prevent the Legislature from making appropriations from April 1st to April 1st, two years hence.

December 27, 1904.

HON. N. C. MILLER,
Attorney General,
Denver, Colorado.

Dear Sir—I have the honor to acknowledge receipt of your official letter, requesting my opinion as to whether or not it is possible for the Legislature of this State to pass a general appropriation bill covering a period of time from April 1 to April 1, two years hence.

The fiscal year begins December 1 and ends November 30, in the following year.

Section 1, article X, Constitution.
1 M. A. S., section 1854.
In re Contracting of State Debt, 21 Colo., 399, 402.

The fiscal year, beginning December 1, 1904, is known as the fiscal year of 1905.

In re House Bill No. 25, 15 Colo., 602.
Opinions, Attorney General Maupin, 1891-92, page 11.

The term "year" in section 3, article XI, of the Constitution, means "fiscal year."

In re Contracting State Debt, 21 Colo., 399, 402.

"It has been suggested that the practice heretofore has been to make appropriations for the calendar instead of for the fiscal year. This is not the method contemplated by the Constitution, as is clearly manifest from several sections relating to the subject. Article X, sections 2, 16. A more careful adherence to the constitutional method would undoubtedly prove advantageous, by making the line of demarkation between legitimate and excessive appropriations more easily discernible."

In re Appropriations, 13 Colo., 316, 324.

Since the above decision was rendered by the Supreme Court in the year 1889, it has been the practice of the Legislature to make appropriations for fiscal years, generally, for the biennial period consisting of two successive fiscal years.

"The appropriations for ordinary purposes generally extend through a period of only two fiscal years."

In re Appropriations, 13 Colo., 316, 324.

"Our General Assembly meets biennially and at each session legislates with respect to the raising and disbursing of revenue for the two fiscal years next ensuing."

In re Contracting State Debt, 21 Colo., 399, 402.

The Supreme Court does not intimate in the above cited decision (In re Appropriations) that the appropriations for other than fiscal years are invalid, but suggests that appropriations for fiscal years are contemplated by the Constitution, and that an adherence to the constitutional method would undoubtedly prove advantageous.

Opinions of Attorney General Jones, 1889-90, page 58.

The Fifteenth General Assembly, which is about to convene, might pass a general appropriation bill, covering a period of time from April 1, 1905, to November 30, 1906, which is the usual period of time covered by a general appropriation bill, making the appropriations therein payable out of the revenues of the fiscal years 1905 and 1906, and might also include in such general appropriation bill appropriations for legislative, executive and judicial expenses of the State government for the months of December, 1906, and January, February and March, 1907, being the first four months of the fiscal year 1907. Such appropriations for the Executive and Judicial Departments should be made payable out of the revenues of the fiscal year 1907, and for the Legislative Department might be made payable out of the revenues of the fiscal years 1907 and 1908. The legislative expenses of a biennial period are commonly apportioned between the two years of that biennial period. Such a method of appropriation

would duly observe the respective fiscal years, and would not be in conflict with anything contained in the decision in In re Appropriations, cited above.

After the Legislature adopted the practice of making biennial appropriations for the fiscal years, there was a period of time from the first day of December in each even numbered year, until the biennial session of the Legislature in the succeeding January, during which there was no provision of law for the payment of the salaries or the contingent or incidental expenses of the Legislative, Executive or Judicial Departments of State.

The General Assembly has usually been very prompt, upon its meeting in January, in passing the appropriation bill providing for the payment of the per diem and mileage of its members, the per diem of its clerks and employes and the contingent and incidental expenses of the Legislature.

The General Assembly always passes a short appropriation bill, covering the months of December, January, February and March, providing for the payment of the salaries and contingent and incidental expenses of the Executive and Judicial Departments of State; but this short appropriation bill is seldom passed until the month of February, and frequently not until the last of February. These two departments are therefore left without any provision for their support for a period of from two to three months in each biennial period.

At or near the close of each legislative session, a general appropriation bill, commonly called "the long appropriation bill," is passed, which provides for the expenses of the three departments of state, from April 1st to the 30th day of November in the next succeeding year.

In the case, *In re* Continuing Appropriations, 18 Colo., 192, decided in 1893, the Supreme Court of this State, in response to a legislative question, refused to follow the earlier case of People vs. Spruance, 8 Colo., 530, decided in 1885, and held that

"As to those appropriations designated in the question as 'continuing appropriations,' that is, those, the payment of which is to be continued beyond the next biennial session of the Legislature, we see no constitutional objection thereto. The power of the Legislature, except as otherwise restricted, by the Constitution, is plenary over the entire subject."

Our Supreme Court, in several subsequent opinions, has adhered to the doctrine of continuing appropriations.

Goodykoontz vs. Acker, 19 Colo., 360.

People ex rel. Hegwer vs. Goodykoontz, 22 Colo., 507.

In the Hegwer case it was held that when the Constitution or a statute fixes the salary to be received by a public officer, it operates as a continuing appropriation therefor, and no further

legislative sanction is necessary to authorize the proper officers to pay the same.

Since the adoption of the doctrine of continuing appropriations by our Supreme Court, the fixed salaries of the various State officers have been paid as continuing appropriations, without regard to the passage of either the short or the long appropriation bills by the Legislature. However, there is still no provision for the payment, after the 30th of November preceding the biennial legislative session, of the contingent and incidental expenses of the three departments, nor for the payment of the salaries of many of the clerks and employes of the Executive and Judicial Departments, whose employment is not provided for by law, except by appropriations for their payment in the general appropriation bills.

The absolute necessity for continuing the employment of these clerks and employes of the Executive and Judicial Departments, as well as for the purchase of stationery, printing and other necessary supplies for the use of the three departments of State, is recognized by all departments of State, and it has been the practice for many years to continue the employment of such persons and to purchase such necessary supplies without any authority of law therefor, trusting to the Legislature to provide for the payment therefor, which has always been done, commonly in the short appropriation bill for the Executive and Judicial Departments, and in part by the appropriation bill providing for the legislative expenses.

There being no auditing board at this period, and no check upon the several departments of State in the matter of expenses incurred by them, or the amount of supplies purchased during said period, it is only a question of time when abuses will creep in.

Several methods may be suggested by which the Legislature may guard against possible abuses and avoid the inconvenience resulting from the present absurd practice of leaving the several departments of State without an appropriation for from one to three months in each biennial period.

1. The beginning and end of the fiscal year might be changed, although there is some advantage in the present method of having the fiscal year end one month before the meeting of the General Assembly.

2. The General Assembly might pass separate bills providing for the employment of necessary clerks and employes in the several departments of State, and fix their salaries in such a manner as to make the same continuing appropriations.

3. Continuing appropriations might be made for the various departments of State in lump sums, sufficient in amount to provide for the salaries of the clerks and employes thereof.

4. The Secretary of State might by law be constituted the general purchasing agent of the State, with power to supervise

the purchase of all supplies for the three departments of State, and, if necessary, his acts might be made subject to the supervision of a permanent auditing board.

Miller vs. Edwards, 8 Colo., 528.
Mulnix vs. Life Ins. Co., 23 Colo., 71, 80.
Section 29, article V, Constitution.
1 M. A. S., sections 1777 and 1782.
Opinions of Attorney General Engley, 1893-94, pages 8, 42.

5. The present method of creating an auditing board and defining its duties and powers in the general appropriation bill is, to say the least, of very doubtful legality. The Legislature might provide by law for a permanent auditing board, define its powers and duties, and make a continuing appropriation for contingent and incidental expenses, and clerical salaries of the three departments, to be expended under the direction of such board.

6. The power of the Legislature over appropriations, except as limited by the Constitution, is plenary; and in my opinion, there is no constitutional restriction which will prevent the Legislature from making appropriations from April 1st to April 1st two years hence, in the manner outlined above.

Many of the items, as, for example, "officers' fixed salaries," in both the short and the long appropriation bills, are continuing appropriations, which must be paid irrespective of their mention in or omission from said bills. These items, therefore, should be omitted from said bills.

Respectfully submitted,

CALVIN E. REED,
Assistant Attorney General.

AGRICULTURAL COLLEGE.

The president of the State Board of Agriculture is a public officer, and the present incumbent of said office is not entitled to the salary of two hundred dollars per annum because the law went into effect after he was elected to the office.

April 5, 1906.

HON. P. F. SHARP,
President State Board of Agriculture,
Denver, Colorado.

Dear Sir—In answer to your request for an opinion as to whether or not under the provisions of the act passed during

the last session of the Legislature, you, as president of the State Board of Agriculture, may accept the salary of $200 per annum, which said act permits the board to allow the president, I beg to say:

Said act is entitled: "An act to amend an act entitled 'An act to establish a State Board of Agriculture, and to define its duties,' approved February 27, 1877, and as amended February 12, 1879," and may be found in the Session Laws of 1905, at page 318.

This act was approved April 10, 1905, but did not go into effect until ninety days after its passage.

The general rule is that in the absence of any constitutional restriction, the salary of a public officer may, by proper legislative authority, be either increased or diminished during his official term.

The Constitution of Colorado provides:

"Except as otherwise provided by this Constitution, no law shall extend the term of any public officer, or increase or diminish his salary and emoluments after his election or appointment."

Article V, section 30, Constitution of Colorado.

The old law allowed the members of said board four dollars per diem and actual traveling expenses, but provided no additional compensation for the president of the board. The new law provides that the members of said board shall receive no compensation for their services, but may be allowed actual traveling expenses.

The president of the board may be allowed a salary of $200 per annum, under the new law, but said law does not contain an emergency clause, and therefore it did not go into effect until ninety days after its passage.

According to the information given to me, you were elected president of said board on the 25th day of April, 1905. It will be observed that the new law did not go into effect until after your election.

I am of the opinion that you are a public officer within the meaning of the law, and as you were elected president of the board on April 25, 1905, and before the new law went into effect, you would not be entitled to said salary of $200 per annum, because of said constitutional provision, which expressly forbids an increase in the compensation of a public officer after his election or appointment.

Yours truly,

N. C. MILLER,
Attorney General.

By W. R. RAMSEY,
Assistant Attorney General.

APPROPRIATION.

State officer has not authority to expend money for a different purpose than that plainly indicated in the appropriation.

February 5, 1906.

HON. A. E. BENT,
Auditor of State,
Denver, Colorado.

Dear Sir—I have your letter transmitting the communication of J. M. Woodard, Game and Fish Commissioner, asking a construction of the appropriation contained on pages 234 and 235 of the Session Laws of 1905.

The statement is made that the salary provided for by that appropriation for the year 1905 has not been used. It is desired to erect a fish hatchery with the money appropriated for that purpose, and to use the salary intended for the year 1905 for maintenance of the hatchery.

The appropriation allows an annual salary of $900.00 for assistant superintendent, and I am unable to contrive any legal way in which the Auditor can take appropriations made for salaries and use them for the purchase of material and supplies. If such construction could be upheld, then there is no use in the Legislature making appropriations, but it might simply direct the Auditor to run the State with what money there is in the treasury.

The object of appropriations is to define the purpose for which the moneys shall be used.

Yours truly,
N. C. MILLER,
Attorney General.

APPROPRIATION FOR INSANE ASYLUM.

H. B. No. 318, entitled "An act for the payment of a part of the maintenance, support and incidental and other necessary expenditures for the State Insane Asylum for the years 1904-1905, approved March 2nd, 1905," is valid, although there is a discrepancy between the title and the provisions of section 1 of said act.

March 14, 1905.

HON. ALFRED E. BENT,
Auditor of State,
State Capitol.

Dear Sir—Replying to your communication of the 8th inst., enclosing certified copy of H. B. No. 318, entitled "An act for the payment of a part of the maintenance, support and incidental and other necessary expenditures for the State Insane Asylum for the years 1904-1905," approved March 2, 1905, in which you call attention to a discrepancy between the title and the provisions of section 1 of said act, and inquire as to your right to issue warrants against this appropriation, I would say that I have examined said act and the title thereto and find that the variance is confined alone to the time for which the appropriation is to be made.

The title indicates that the appropriation is for the years 1904-1905, while section 1 of said act states that it is for the years 1905-1906.

It seems quite clear from reading the whole of said act that the intention of the Legislature was to appropriate $35,000.00 for the expenses of said Insane Asylum, for the years 1905-1906, commencing December 1st, 1904, and ending November 30th, 1906, and I think the mis-recital, in the title, of the years for which the same was to be made, is a clerical error, or mistake. I do not regard this such a variance as is fatal.

When, from an examination of the entire statute, the intention can be ascertained by a reasonable construction, such construction should be made effective. At one time, the prefixing of a title to an act was deemed of so little importance that it was the practice in Parliament to allow the clerk of the House in which the bill originated to supply the title. Such, however, has not been the rule in this country. Here, from the earliest times, it has been the practice of both houses to aid in framing the title. It was by reason of such legislative sanction that, in order to ascertain the object of an act, for the purpose of construing doubtful language, an examination of the title has been frequently re-

sorted to by courts. In this way, the title of an act was first given importance and the exercise of care in framing it became necessary.

Recently, by a constitutional provision in some of the States, somewhat similar to our own, the title has been made a matter of primary importance.

Our Constitution, article V, section 21, provides:

"No bill except general appropriation bills shall be passed containing more than one subject, which shall be clearly expressed in its title, but if any subject shall be embraced in any act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed."

This constitutional inhibition must receive a reasonable construction. It is enough if the bill treats of but one *general subject,* and that subject is expressed in the title; to require that each subdivision of the subject, each and every of the "ends and means necessary or convenient for the accomplishment of the object," must be specifically mentioned in the title, would greatly impede and embarrass legitimate legislation. Judge Cooley asserts that it would "actually render legislation impossible."

Golden Canal Co. vs. Bright, 8 Colo., 149.

Cooley Const. Lim., page 144.

Ludington vs. Heilman, 9 C. A., 551.

In construing this constitutional provision, it is important to bear in mind the evils sought to be corrected thereby. The practice of putting together in one bill subjects having no necessary or proper connection, for the purpose of enlisting in support of such bill the advocates of each measure, and thus securing the enactment of measures that could not be carried upon their merits, was undoubtedly one of the evils sought to be eradicated. Another object is to prevent surprise and fraud from being practiced upon legislators, and to apprise the People of the subjects of legislation by the titles of the bills, so that they might have an opportunity to be heard by petition or otherwise. But few are able or care to take the time necessary to keep informed of all the legislation proposed at a single session where it is necessary to examine in detail every bill in order to obtain this information. When, however, each proposed act is confined to a single subject, and that subject is clearly expressed in the title, those interested are put upon inquiry when legislation is proposed affecting such subject, without its being necessary for them to examine every bill for the purpose of seeing that nothing objectionable is coiled up within the folds of the measure.

Catron vs. County Comrs., 18 Colo., 557.

The leading object of the act in question was the appropriation for the benefit of the State Insane Asylum, and the title of the act would, perhaps, have been good without specially reciting the years for which the appropriation was to be made. I think that the subject of the act is sufficiently expressed in the title. The year 1905 is included in section 1, and also in the title of said act.

In a Texas case, where the title of an act amending another act mis-recites the date of the act intended to be amended, and the original act was the only one ever passed on the same subject-matter, it was held that the mistake in the date could surprise or mislead no one, and the validity of the amending enactment was not affected thereby. See

State vs. McCracken, 42 Tex. Rep., 386.

In the case before us the appropriation for the year 1904 had already been made, as I understand it, and it is not at all probable that anybody was misled, or deceived, by the title of the act in question.

Therefore, I think it will be proper for you to issue warrants against this appropriation.

Respectfully,

N. C. MILLER,
Attorney General.

By W. R. RAMSEY,
Assistant Attorney General.

APPROPRIATIONS.

Advisability of passing an act similar to the one found at page 122, Session Laws 1881, repealing outstanding appropriations, except special funds. "Special fund" is not "special appropriation." A "special fund" is one created by the fractional mill levies.

November 12, 1906.

HON. A. E. BENT,
Auditor of State,
State Capitol, Denver.

Dear Sir—On the 4th day of February, 1881, the Legislature of Colorado passed the following act:

"AN ACT IN RELATION TO SURPLUS FUNDS IN THE STATE TREASURY.

"Be it Enacted by the General Assembly of the State of Colorado:

"Section 1. That all sums of money remaining in the hands of the State Treasurer, other than that set apart by law for a

special fund, shall be by said Treasurer carried to the general fund."

Laws 1881, page 122.

A similar act has not been passed since that time.

The general appropriation bill at the end of each biennial period carries all the balance unexpended to the general fund. It has been "expended" if bills have been contracted against it, for the reason that no bills can be contracted unless there is money appropriated for that purpose. The mere creation of a debt against the appropriation is in reality its expenditure; so that the balance may be drawn against and paid out after the biennial period, although no bills can be contracted against the general fund after the end of the biennial period.

There is a large number of appropriations in the Session Laws of Colorado that have never been paid, and which have a legal claim on any surplus of the various biennial periods. These appropriations should be paid in the order of their passage—those of the earliest date taking first rank.

I am convinced from an examination of the Session Laws that it is impossible to comply with the law in relation to the payment of the old appropriations, and yet any person having an interest in any appropriation could make serious trouble for the Auditor if the order of payment is disregarded.

I think it is my duty to advise that an act similar to that of 1881 should be passed.

The expression, "special fund," means something different from "special appropriation." It appears to refer to those funds that are created by the fractional mill levies. These are what are known in Colorado as "special funds." The opposite idea is expressed by the term "general fund." Hence, in Colorado we have two funds—a "general fund," created by the balance of the four-mill levy after subtracting the fractional mill levies, and a "special fund." Therefore, a statute similar to the one quoted in this letter would repeal all these appropriations except the funds belonging to the fractional mill levies.

I have written this letter since the conversation I had with you the other day concerning this matter, in order that you may make such recommendation to the Legislature in this regard as you may deem wise.

Yours respectfully,

N. C. MILLER,
Attorney General.

APPROPRIATIONS.

An appropriation should show clearly the purpose for which it is to be expended.

September 8, 1905.

HON. ALFRED E. BENT,
Auditor of State,
Denver, Colorado.

Dear Sir—I have your communication of this date, asking for an opinion as to the right to pay vouchers for the erection of a building by the State Board of Agriculture for the purpose of conducting experiments in horse-breeding.

I understand from your letter and the correspondence with the Secretary of the Board, that the right is claimed to erect a building and pay for it out of the appropriation covered by section 2 of chapter 30 of the Laws of 1905, the same being an appropriation for the State Agricultural College. Our Constitution provides:

"No money shall be paid out of the treasury except upon appropriations made by law and on warrants drawn by the proper officers in pursuance thereof."

Section 33, article V, Constitution of Colorado.

An appropriation is defined to be: "The setting aside of money to a particular person or use, to the exclusion of all other persons or uses." (Enc. of Law, volume II, page 514.)

State vs. Sioux City Ry. Co., 7 Neb., 323.
Woodward vs. Reynolds, 58 Conn., 490.
State vs. Bordelon, 6 La. Ann., 68.

The construction of provisions in appropriation bills is to be made in accordance with the natural meaning of words. It seems to me that the Auditor must adopt the natural interpretation of provisions of appropriation bills, and reject obscure and hidden purposes. There is a radical difference between the maintenance of institutions already in existence and the enlargement and extension of the same. This difference is so marked that it was thought advisable at one time to place all appropriations for extensions and improvements in a class by themselves, so that they would come after all moneys for the maintenance of institutions and any expenses.

If the reading of section 2 can justifiably give rise to the belief that the Legislature intended the erection of a building, the contention on the part of the board may be sustained. An investigation to develop beef, pork, mutton, wool and horse-producing interests does not imply the right to construct a building which would practically wipe out the entire fund of five thousand dollars, and leave nothing for the purpose of experiment. And so, also, we may say that the right to use the five thousand dollars, or any portion thereof, in testing the grasses, grains and forage crops of the State is not to be assumed to be the right to construct a building costing $4,500 and leaving a balance of only $500.

The appropriation should be sufficiently clear to indicate that a building was to be constructed before, in my judgment, you would be justified in paying vouchers for the same. Any other construction, it seems to me, would allow appropriations to be obtained apparently for one purpose and the money spent for another, and this is prohibited by the Constitution.

I do not think that the language is section 1 would justify the use of any portion of the appropriation mentioned in section 2. A specific appropriation is made in section 1 for the purposes therein mentioned.

Yours truly,

N. C. MILLER,
Attorney General.

Enclosure.

APPROPRIATIONS.

An appropriation for a fish hatchery does not include a dwelling house for the superintendent.

September 11, 1905.

Hon. J. M. Woodard,
State Game and Fish Commissioner,
Denver, Colorado.

Dear Sir—In reply to your written request of this date for an opinion as to whether the act found at page 233 of the Session Laws of 1905, appropriating five thousand dollars for a fish hatchery at a point near the town of Del Norte, gives you authority to erect a residence for the superintendent, I beg to say that the terms of this act plainly designate the purposes for which this money is appropriated, to wit:

"For the purpose of *purchasing a site* for a branch State fish hatchery at a point near the town of Del Norte, and on the

north side of the Rio Grande river, section 19, township 40 north, range 6 east, at a point to be selected by the Fish Commissioner of the State of Colorado, and to pay for the *erection* and *stocking* of said hatchery."

In accordance with this provision, three specific things are to be done by you: First, to purchase a site; second, to erect a hatchery; and, third, to stock the hatchery.

As the terms of the act nowhere provide for building a residence, you certainly would not be justified in doing so.

Yours truly,

N. C. MILLER,
Attorney General.
By I. B. MELVILLE,
Assistant Attorney General.

ASSESSORS.

The exemption of $200 belongs only to residents of the State of Colorado.

December 1, 1905.

Hon. F. W. Brush,
Assessor Chaffee County,
Buena Vista, Colorado.

Dear Sir—I have your letter of August 28th, reading as follows:

"I have a party assessed, personal property, situate in Salida, Colorado. Said party now resides at Mercer, Utah. I am asked to grant the two hundred dollars exemption under the new Constitution. I would thank you for your construction as to whether or not a person must be a resident of the county wherein the property is situated or not; this being a question as to the construction of the Constitution, I thought it advisable to consult your office."

The previous constitutional provision concerning exemptions, under our revenue laws, is found at page 295, 1 M. A. S. The particular clause concerning exemption of personal property reads as follows:

"Provided, further, That the household goods of every person being the head of a family to the value of two hundred dollars shall be exempt from taxation."

The new constitutional provision is found at page 29, 3 M. A. S. (R. S.), or at page 152, Session Laws 1903. The provision

relating to the exemption of personal property in the constitutional amendment reads as follows:

"Provided, That the personal property of every person, being the head of a family, to the value of two hundred dollars shall be exempt from taxation."

It will, therefore, be seen that the Legislature framed the amendment by changing the expression "household goods" to "personal property."

The original constitutional provision having reference only to "household goods" was, by the very nature of the articles exempted, limited to residents of the county and State where they were situated. It would seldom occur that the head of a family could claim exemptions in household goods unless he lived in the county and State.

Now, it is a well settled principle of law that reference may be made to the original statute in order to construe the amendment thereto.

I believe that the Legislature in drafting this amendment intended only to grant the exemption to residents of the county and State. I think the intention was to enlarge the subjects of exemption, but not the persons entitled to enjoy the exemption. I think this was well understood in all the discussions concerning this statute at the time it was voted upon by the people. The people understood that they were enlarging the nature of the property to which the exemption was to belong, and not the personal privilege to enjoy it.

If every person is to enjoy exemption of personal property to the amount of two hundred dollars, regardless of residence, the following absurdities would arise: Persons who have personal property in several counties of the State could enjoy a number of exemptions; persons owning personal property in Utah and Colorado could enjoy exemptions in both States. This is contrary to the fundamental idea of exemptions on personal property. The idea of exempting personal property from taxation is to favor the poor, and not to multiply instances of exemption. Moreover, exemptions from taxation are not favored by the courts, and an express provision must be found in order to secure the exemption.

Gillman vs. Sheboygan, 2 Black, 513.
Rector vs. Philadelphia Co., 24 How., 302.

Discrimination between residents and non-residents in the matter of exemptions is not invalid. It is sufficient that all the persons in the class be taxed alike. There are reasons why residents of a state shall be entitled to exemptions from taxation which do not apply to non-residents. Exemption is a personal matter and not a property right. Uniformity of taxation merely requires that all property be valued alike, and that it be as-

sessed alike, and that it be subject to the same rate of taxation so far as the same class of property is concerned. Mining property is valued in a different manner from other property, but it is subject to the same rate of taxation when so valued.

Williams vs. Reese, 9 Bissell, 405.
Ducat vs. Chicago, 48 Ill., 172.
Sherlock vs. Winnetker, 68 Ill., 530.
State Railroad Tax Cases, 92 U. S., 575.
People vs. Henderson, 12 Colo., 376.

I have no doubt but what some attorneys may have a different view as to the construction of this provision, but I have given the same careful consideration and thought, and it is my belief that the construction above indicated is correct, and is in conformity with the principles of exemptions from taxation.

Respectfully,
N. C. MILLER,
Attorney General.

ASSESSORS—DUTIES—ASSESSMENT ROLL—AFFIDAVIT.

Each assessor is required to have the assessment rolls for his county at the meeting of the county assessors held on the first Tuesday in August of each year, so that the comparison required by statute may be made; and on or before September 1st of each year must produce in person to the Auditor said assessment roll, together with a complete abstract thereof, and also make the necessary affidavit to be appended to his said assessment rolls.

July 19, 1905.

HON. ALFRED E. BENT,
Auditor of State,
Denver, Colorado.

Dear Sir—I have your letter of July 15th, in which you request an opinion concerning the duties imposed upon county assessors by sections 84 and 87 of the Public Revenue Act of 1902.

In answer thereto, I would say that by section 87 of said act, it is made the duty of all the county assessors of this State to meet at the Capitol at the hour of ten o'clock a. m., on the first Tuesday in August in each year, in a place provided by the Auditor for said meeting, for the purpose of comparing their

assessment rolls before making affidavit thereto. Each assessor should have then and there the assessment roll of his county, so that the necessary comparison may be made; and if any assessor is satisfied upon such comparison, and from other information obtainable, that his valuation of any class of property is too high or too low, and that it does not correctly set forth the true value thereof, it shall be his duty to correct the same, and thereafter make the affidavit required by section 84.

According to the provisions of section 84, I am of the opinion that the assessor of each county, except assessors in counties having more than 100,000 in population, which at present would apply only to the county of Denver, is required, upon the completion of the assessment roll of his county in each year, and after having performed the duties required by section 87, and prior to the endorsement of the tax list and warrant thereon, to produce in person and not by deputy, to the Auditor the assessment roll of his county, together with a complete abstract thereof, and that he shall then and there, in the presence of the Auditor, subscribe his name and be sworn to the truth of the facts set forth in the affidavit or statement which is required to be appended to said assessment roll and constitutes a part thereof, to wit:

"State of Colorado, }
"County of..... } ss.

"I, ..., the assessor of ..... county, Colorado, do solemnly swear that in the above and foregoing assessment roll I have assessed all taxable property in the county of.....for the current year and at the true value thereof.

"....,

"Subscribed and sworn to before me this ..... day of ....., A. D. 19.....

"....,
"Auditor of State."

This must be done on or before September 1st of each year.

The Auditor is required to administer said oath to the assessor so subscribing said statement. As the county of Denver is the only one having a population of more than 100,000, the assessor of said county is required to produce his assessment rolls and subscribe and swear to the statement prescribed by section 87, in like manner and under the same conditions prescribed in this section for the assessment of the counties of the State having less than 100,000 in population, except that he shall produce said rolls and subscribe and swear to said statement at the city of Boulder, in the presence of the Auditor, on or before the 1st day of September in each year, on a day to be fixed by the Auditor, who shall attend in person at the city of Boulder, there to receive said assessment rolls from the assessors of counties

having more than 100,000 in population, and to administer the above required oath to such assessors.

It is the duty of the Auditor to make and preserve in his office a record of such presentation and authentication of his assessment rolls by the assessor of each county of the State, and the Auditor's certificate of such oath, or the record thereof in the Auditor's office, shall be conclusive evidence of the fact, time and place of the making of such oath.

The foregoing seems to me to be the proper construction of the statute, avoids any conflict and harmonizes the two sections to which you refer; and that the same was the intention of the Legislature, I think is sustained by section 89 of said act, which provides that after the meeting of the assessors, as aforesaid, and after the abstract of assessment has been produced to the Auditor, and the affidavit of said assessment roll has been subscribed and sworn to by the assessor, and not until then, such assessor shall be entitled to fifty dollars and railway fare actually paid out, to cover the additional expense of the assessor and as further compensation for his services.

It is also provided by section 85 of said act that if it shall appear that any assessor wilfully and knowingly omitted from his assessment roll any of the taxable property in his county, or wilfully or knowingly assessed the property in his county, or any part thereof, below its true value, as set forth in the statement subscribed by the assessor as provided in section 84, he shall be deemed guilty of perjury, and, upon conviction, shall be punished accordingly.

As stated above, I am of the opinion that the assessors should present to you both the abstract of assessment and the assessment roll, and that the affidavit or statement required to be made by him applies to the assessment roll.

The foregoing requirements may seem inconvenient and in some instances impracticable. However, our law-makers have so provided, and I know of no remedy except further legislation.

Yours truly,

N. C. MILLER,
Attorney General.
By W. R. RAMSEY,
Assistant Attorney General.

CAPITOL.

Control of the capitol grounds considered in connection with the appropriation to erect a monument to the memory of Colorado soldiers who fell in the Civil war.

February 3, 1906.

Hon. Jesse F. McDonald,
Governor of Colorado,
State Capitol.

Dear Sir—I have your communication of February 2d, transmitting a copy of an act entitled "An Act to Provide for a Monument to Be Erected to the Memory of the Colorado Soldiers Who Fell in the Civil War, to Be Erected on the Site of the Capitol Grounds at Denver, and Making an Appropriation Therefor."

An opinion is asked as to whether the board created under that act has power to select any site on the Capitol grounds which it may deem best suited for the purpose of erecting such monument.

The particular act authorizing the erection of a suitable monument to the memory of the Colorado soldiers who fell in the Civil war is found on page 78 of the Session Laws of 1905. Section 3 is pertinent to the question submitted. It reads as follows:

"It shall be the duty of the board, as soon as may be practical and possible after this act shall take effect, to carefully investigate and select the most desirable location, upon the State Capitol grounds at Denver, for the site of the said monument."

It is also necessary to refer to section 329a, found on page 151, volume 3, M. A. S. (R. S.). I quote from this act the following:

"That there is hereby created a Board of Capitol Managers for the purpose of supervising and directing the construction, completion and furnishing of the State Capitol building for the State of Colorado, and laying out, improving and ornamenting the grounds thereof at the city of Denver. * * * The care and control of the Capitol building and grounds shall be with the Board of Capitol Managers."

The supreme control over the Capitol and the grounds on which it is situated is in the Legislature. The latter body saw fit to create a Board of Capitol Managers for the purpose stated. The plan was to make this a permanent board, so that the general arrangement and symmetry of the grounds would not be destroyed by conflicting supervision and control.

However, the power granted to the State Board of Capitol Managers did not prevent the Legislature, at a subsequent session, by an appropriate act, from creating another board for a special purpose, nor did it prevent the Legislature from undoing what it set out to accomplish by the act of 1897—the one which created the State Board of Capitol Managers.

But it is not to be presumed that the Legislature intended to do an unwise act, and therefore I presume the two acts can be construed without much apparent conflict.

In my opinion, the act of 1905, for the purpose of erecting a suitable monument to the memory of Colorado soldiers who fell in the Civil war, vested the board having that matter in control with power to investigate and select the most desirable location upon the State Capitol grounds, *which was not already selected and dedicated to some different and other purpose.* The power of selection granted to the latter body was not intended to interfere with the selections already made.

I have been informed that the site selected by the soldiers of the Philippine war is desired by some of the members of the board who have charge of the erection of a suitable monument to the memory of the soldiers who fell in the Civil war.

I presume the selection made by the soldiers of the Philippine war was legally made. Accepting this latter statement as true, then I do not believe that the board which has the erection of this monument in control can choose that particular site. To hold that the board would have a right to demand that particular site because of the power conveyed under the act of 1905 would be to argue that some future Legislature might create a board for the erection of a monument to the pioneers, or to some other reputable organization, and that that body would have a right to eject the monument erected to the memory of these soldiers and put theirs up in its stead.

I think that there can be no doubt about the soundness of the conclusion that the power to select is limited to the grounds not already dedicated or devoted to some particular purpose.

Respectfully submitted,

N. C. MILLER,
Attorney General.

Certificates of indebtedness issued to Sherman M. Bell.

November 15, 1905.

HON. A. E. BENT,
Auditor of State,
State Capitol, Denver.

Dear Sir—I return herewith the Sherman M. Bell Certificates of Indebtedness after investigating the matter.

As I understand it, the holders of these Certificates of Indebtedness desire to turn them in to your office and have them cancelled and secure individual certificates of indebtedness to the parties in interest. These certificates were issued to Sherman Bell to enable him to cash them and he take the money and pay off the various persons represented in the certificates. This, of course, he is now unable to do and the individuals desire a certificate for their claim. I believe they ought to have the same, but I have come to the conclusion that it is not within your power to cancel the outstanding certificates and issue new ones without having a voucher for each certificate. This voucher you can only obtain by action of the Military Board, and upon the direction of this board you can cancel the same and if they would voucher up the individual claims, you could issue certificates of indebtedness upon the separate items. I see no difficulty in this; if Adjutant General Bulkeley Wells will agree to voucher the claims, the Governor and myself will sign the certificates of indebtedness.

Unless the voucher bears the approval of the Adjutant General we could not do so. You understand that all the vouchers in your office are so audited, and this is the only protection which the Governor and myself have in signing the voucher.

Yours truly,

N. C. MILLER,
Attorney General.

CONVICTS—EXPENSE OF SUBSISTENCE.

The expense of subsistence for convicts working upon public highways must be borne by the State, and not by the counties working such convicts.

November 22, 1905.

MR. H. L. WHITE,
Secretary Board Penitentiary Commissioners,
Canon City, Colorado.

Dear Sir—I am in receipt of your communication dated November 20, 1905, informing me that the Board of Commissioners of the Colorado State Penitentiary desires an opinion from this office on the following questions, namely:

"First. As to whether the subsistence of prisoners detailed to work upon public highways under the act of the General Assembly of the State of Colorado, entitled, 'An act providing for the working of convicts in the Colorado State Penitentiary upon the public roads and highways within any county,' etc.,

approved April 11, 1905, should be borne by the county making the request for such prisoners, or by the State."

"Second. Would a contract to subsist prisoners made with a county bind such county with reference to the power under said act on the part of the penitentiary commissioners to make such contract, or have they such power."

In answer to the first question, I beg to say that the act referred to expressly provides the conditions upon which such convicts may be worked in any county making such request. Said provision is as follows:

"That such county shall pay all additional expenses of guarding said convicts while working upon said public roads and highways within such county and shall furnish all tools and materials necessary in the performance of said work."

No other requirement or expense on the part of such county is mentioned; and I think if the Legislature had intended to require such counties to furnish subsistence to the convicts who worked therein, the statute would have so provided, and in the absence of any such provision, I am of the opinion that such expense of subsistence must be borne by the State. The State is required by law to furnish food and clothing to all convicts, whether they work within or outside of the Penitentiary, and said act, as I understand and construe it, only intended to impose upon the counties the additional or extra expense of guards, tools and materials necessary to carry on the work.

As to the second question, I would say that the State has provided by law that all provisions and supplies for the convicts shall be furnished by the Board of Penitentiary Commissioners by contract with the lowest bidder and the necessary appropriations are made for the payment of the same, and I am of the opinion that the said Board has no power to make, or bind a county by contract, to furnish subsistence for convicts working in such county under the provisions of said act approved April 11, 1905.

Yours respectfully,

N. C. MILLER,
Attorney General.

By W. R. RAMSEY,
Assistant Attorney General.

CORPORATIONS.

When articles of incorporation are to be construed as not for pecuniary profit.

Articles should not provide for issuance of shares of stock and management by the shareholders.

February 10, 1905.

HON. JAMES COWIE,
Secretary of State,
State Capitol.

Dear Sir—The articles of incorporation of The Swedish Consumptive Sanitarium have been submitted to me for examination and report, as to whether the filing of such articles should be accompanied by the ordinary fee, and whether these articles are to be interpreted as articles of a corporation for pecuniary profit.

The laws of Colorado provide that:

"Any three or more persons who shall desire to associate themselves together for any lawful purpose other than for pecuniary profit, under the provisions of this act, may make, sign and acknowledge before any officer authorized to take acknowledgments of deeds in the State, and file in the office of the Secretary of State a certificate in writing, in which shall be stated the name or title by which such corporation shall be known in law, the particular business and objects for which it is formed, the number of its directors, trustees or managers, and the names of those selected for the first year of its existence."

Volume 1, M. A. S., section 636.

The articles in question give the name of the corporation, the business and objects for which it is formed, the number of directors, trustees or managers and the names of those selected for the first year of its existence. But they go further and recite that:

"The amount of capital stock of the said corporation shall consist of five hundred thousand dollars, divided into five hundred thousand shares of one dollar each."

These articles further provide that the corporation shall not be for profit, but for philanthropic and charitable purposes and to build, erect and conduct a suitable home and sanitarium, with medical dispensary for persons suffering from the first stages of consumption, and no others, at or near the city and county of

Denver; that the charges for all benefits of this home shall be based upon the actual cost and expense of maintaining and conducting the said home—the intention being to make the said institution self-sustaining as near as possible; to form a body politic under the name of The Swedish Consumptive Sanitarium, and by that name have perpetual succession, with power to sue and be sued, to implead and be impleaded and to be capable in law of taking by gift, grant or otherwise, and of purchasing, leasing and conveying, both in law and equity, any estate or interest therein, real, personal or mixed, and to have power to execute and fulfill all such trusts as may be confided to said corporation, and to take, hold, expend, use, manage, lease and dispose of all such trust property as may in any manner come to said corporation charged with any trust or trusts in conformity therewith; to borrow money and to issue bonds if necessary; to pledge or mortgage the property of the corporation to secure the payment of the same; to make, alter or amend by-laws; to have and use a common seal and to make any alterations in the same; and to do and perform any and all things that are usually done in the management of hospitals and sanitariums of like character, in general.

"No division or distribution of the property of any such corporation, association or society shall be made until all debts shall be fully paid, and then only upon its final dissolution and surrender of its organization and name. Nor shall any distribution be made, except by a vote of the majority of the members."

1 M. A. S., section 640.

Section 638 provides:

"For the making of by-laws not inconsistent with the laws of the State, in which by-laws shall be prescribed the duties of all officers of the corporation and the qualifications of the members thereof, etc."

It will be noticed that under section 644 no dissolution and surrender of the organization and name, and no distribution shall be made, except by a vote of the *majority* of the *members.*

Section 639 provides that corporations formed under the provisions of this act shall elect trustees, directors or managers from the *members* thereof.

Section 473, 1 M. A. S., requires the articles to show the amount of capital stock of the company. The election of boards of directors and various other powers are exercised by the stockholders, and the result is determined by the majority of the shares of stock. This is different from corporations organized not for pecuniary profit.

Section 510, concerning banks, provides that the certificate shall recite the amount of capital stock.

Section 520, concerning savings banks, requires a recital as to capital stock. The same is true as to trust, deposit and security associations, section 535. And surety companies must also recite the amount of capital stock. Sections 545 and 473, 1 M. A. S.

Section 555, 1 M. A. S., provides that title guaranty companies must also state the amount of capital stock.

Toll road companies, ditch and flume companies, bridge and ferry companies, mining companies, telegraph and telephone companies are, in the same manner, directly or indirectly required to recite the amount of their capital stock; but it will be observed that the statutes concerning corporations not for pecuniary profit omit this feature.

The articles submitted do designate the amount of capital stock and the number of shares, but no reference is made to the management and control of the corporation by the members. The articles seem to indicate that the capital stock shall govern and control in the management of the association.

I do not know that it is proper for the Attorney General's office to go into the matter of criticising the preparation of these articles. We are only required to determine if the articles, viewed as a whole, are those of a corporation for pecuniary profit or not for pecuniary profit.

The articles contain everything that is required of a corporation not for pecuniary profit, except that they fail to define how membership may be acquired. If they go further than is permitted by the statute, the powers in excess of those conferred by statute are void.

"Every corporation incorporated under any general law of this State, having a capital stock divided into shares, shall pay to the Secretary of State, for the use of the State, a fee of twenty dollars, in case the capital stock which said corporation, joint stock company or association is authorized to have does not exceed fifty thousand dollars; * * * But this act shall not apply to corporations not for pecuniary profit, or corporations organized for religious, educational or benevolent purposes."

Section 1, Laws of 1901, page 116.

This statute contemplates a recital of capital stock divided into shares, and provides that if the corporation whose articles contain such a provision shall not be for pecuniary profit, it shall be exempt from this tax.

I would consider this provision of the statute as decisive of the question which you submit, if there is nothing in the statute governing the organization of this company which prevents it from mentioning the capital stock.

These articles should provide the total number of members that may be admitted to the society, and the cost per member-

ship, or authorize the by-laws to control this matter. This is the usual way of organizing corporations not for pecuniary profit. The affairs of this corporation must be controlled and managed by a board of directors, to be selected by a majority of such members, and the amount of capital stock which any one member holds shall not permit such member to exercise any greater power or choice than any other member.

The capital stock of a corporation performs a greater office than merely to allow the owner to participate in the profits. The capital stock is the amount subscribed by the members, and the creditors of a corporation may compel the payment of the subscription.

In a corporation not for pecuniary profit the capital stock may be used as a means of determining the extent to which a member may participate in the assets of the corporation upon its final dissolution.

The recital of the capital stock, while not conflicting with anything contained in the statute, is not authorized by the statute, and, in my judgment, is misleading. The articles make it clear that the society is not organized for pecuniary profit, and if any attempt is ever made by the stockholders to participate in the profits previous to dissolution, an injunction would be obtainable to prevent this violation of the law.

I am therefore of the opinion that the articles of incorporation of a society not for pecuniary profit should state the conditions and terms of membership, or should authorize the by-laws to control this subject. Where the articles of incorporation are silent on the question is seems to me there is no contract between the society and its members. In short, how can there be any membership, when no way has been provided authorizing or defining how one may become a member? I think articles like those submitted should be rejected.

Respectfully,

N. C. MILLER,
Attorney General.

CORPORATIONS.

The statutes permit the amendment of articles of incorporation of corporations not for pecuniary profit, but are silent as to the method. Therefore, it must be done subject to the regulations found in the articles or the by-laws.

January 5, 1905.

HON. JAMES COWIE,
Secretary of State,
Denver, Colo.

Dear Sir—I am in receipt of the communication transmitted to you by the Hon. George F. Dunklee, on behalf of the Law Committee of the Chamber of Commerce of the city of Denver, Colo., said communication being directed to you for the purpose of securing an opinion upon the following question:

The Denver Chamber of Commerce and Board of Trade is a corporation (not for pecuniary profit) organized under the provisions of sections 636 to 639, 1 Mills' Annotated Statutes. As originally incorporated, it has thirteen directors. It is now thought advisable to amend the articles of incorporation so as to increase the number of directors to fifteen. Can this increase of directors be made under the authority contained in section 477 of 3 Mills' Revised Supplement?

Said section 477 reads as follows:

"That any corporation organized under the laws of this State may amend its articles of incorporation in any respect; provided, no corporation shall by amendment so change its articles as to work a change in the object or purpose for which such corporation was originally organized; provided, that any ditch company may amend its articles, so as to allow it to take stock in telephone companies for the purpose of affording facilities to such ditch companies in carrying on their business only."

Laws of 1891, page 92, section 1.

The remainder of this act, in Session Laws of 1891, deals with the method of procedure to be followed by corporations organized for pecuniary profit, when it is desired to amend the articles of incorporation. This procedure was not adopted for the purpose of affecting corporations not organized for pecuniary profit, and these latter corporations are left to amend their articles under section 477.

The charter is a contract between the stockholders and the corporation. The statutes of the State are also a part of the

articles of incorporation, but there is no statute affecting the mode of amending the articles of incorporation of corporations not for pecuniary profit.

The articles being a contract between the stockholders and the corporation, can not be amended without the consent of all the stockholders, unless the statutes of the State authorize the amendment. The statute does permit this change, but, being silent as to the method of amending, it is subject to such restrictions as may be found in the articles of incorporation or the by-laws of the corporation. The statute authorizing an amendment becomes a part of the articles of incorporation, and therefore an amendment may be made.

If the articles of incorporation do not prescribe a rule by which they may be amended, the method of procedure may be regulated by the by-laws of the Chamber of Commerce.

In other words, if the statute regulates the mode of amendment, it must be followed, if the statute is merely permissive of amendments, without furnishing any mode of procedure, then the by-laws or articles must be followed.

If there is no by-law or article affecting the procedure, the mode should be fixed by the adoption of a by-law.

Respectfully submitted,

N. C. MILLER,
Attorney General.

CORPORATIONS.

Foreign education corporations having capital stock divided into shares, establishing an office in this State, must file articles and pay fee.

August 21, 1905.

HON. JAMES COWIE,
Secretary of State,
Denver, Colo.

Dear Sir—I have your communication in reference to The International Correspondence School, a foreign corporation capitalized at six million dollars, filing a certified copy of its articles of incorporation in this State, and your statement that "The statute requiring all foreign corporations to file certified copies of their articles has not been complied with by this company."

"Every corporation, joint stock company or association, incorporated by or under any general or special law of any foreign state or kingdom, or any state or territory of the United States,

beyond the limits of this State, having a capital stock divided into shares, shall pay to the Secretary of State, for the use of the State, a fee of thirty dollars in case the capital stock which said corporation, joint stock company or association is authorized to have, does not exceed fifty thousand dollars, but in case the capital stock thereof is in excess of fifty thousand dollars, the Secretary of State shall collect the further sum of thirty cents on each and every thousand dollars of such excess, and a like fee of thirty cents on each thousand of the amount of each subsequent increase of stock. The said fee shall be due and payable upon the filing of the certificate of incorporation, articles of association or charter of said corporation, joint stock company or association in the office of the Secretary of State, and no such corporation, joint stock company or association shall have or exercise any corporate powers or hold or acquire any real or personal property, franchises, rights or privileges, or be permitted to do any business or prosecute or defend in any suit in this State until the said fee shall have been paid."

Session Laws 1901, chapter 51, section 4, page 1187.

Section 5 provides that it shall be the duty of the Secretary of State to bring an action in the nature of a writ of *quo warranto* against any foreign corporation which undertakes to do business in the State of Colorado without first filing a copy of its articles of incorporation.

A question has arisen under the statement of facts in this case and the law quoted as to the liability of the International Correspondence School. It has been suggested that the corporation is exempt because it is organized for educational purposes. It is true that Colorado provides for the organization of educational institutions free from liability for filing articles of incorporation. This exemption, however, does not apply to foreign corporations carrying on educational work in this State. It is well settled that a corporation has not the right to carry its existence into a sister state without first complying with the law of that state. Colorado may see fit to encourage educational institutions of her own, but she has not expressed herself as electing to establish institutions which find it necessary to organize under the laws of other states. There are good reasons for requiring such corporations to organize under the laws of our own State. The control of the charter of a foreign corporation is an important matter and some of the greatest law suits have arisen over the charters of great institutions of learning. Some of the wealthiest institutions in the land are educational, religious or charitable. Where the holding of vast property interests is permitted by the State under exemption laws, it is prudent and just that the State should require the holder to obtain its charter from the State.

Section 1416, General Statutes of Colorado, regulates the fee for filing each certificate of incorporation. At the time the stat-

ute was enacted the charge was only $2.50 for fifty thousand, and fifteen cents additional for each additional thousand. This statute made no exemptions in reference to educational institutions.

Section 1868, M. A. S., provides that every corporation incorporated under the laws of this State, or any foreign state or kingdom, having a capital stock divided into shares, shall pay to the Secretary of State a fee of ten dollars in case the capital stock does not exceed $100,000, and for each thousand dollars of capital stock in excess, the further sum of ten cents per thousand.

This statute does not apply to corporations not for pecuniary profit, or corporations organized for religious, educational or benevolent purposes.

The next statute on this subject was passed in 1897, and is found at page 157 of the Session Laws of that year. Section 1 provides that every corporation organized under the laws of this State, or under the laws of any foreign state or kingdom, shall pay a fee of ten dollars in case the capital stock does not exceed $50,000, but for each one thousand dollars of excess, it shall pay fifteen cents per thousand. This statute also exempts corporations not for pecuniary profit and corporations organized for religious, educational or benevolent purposes.

The final legislation on this subject is found in the Session Laws of 1901, beginning with section 4, page 118.

This statute provides that foreign corporations shall pay a fee of thirty dollars in case the capital stock does not exceed $50,000, and an additional fee of thirty cents on each thousand dollars of capital stock in excess thereof. This statute does not exempt corporations not for pecuniary profit, nor corporations organized for religious, educational or benevolent purposes. But if we turn to section 1 of the same act, at page 117, we find that such domestic corporations organized under the laws of the State of Colorado are exempt. The act says that it shall not apply to corporations not for pecuniary profit, nor to corporations organized for religious, educational or benevolent purposes.

This is a distinct manifestation of purpose on the part of the Legislature to require corporations not for pecuniary profit, or for educational, religious or benevolent purposes, to organize under the laws of this State if they wished to avail themselves of the exemption.

The case of Paul vs. Virginia, 8 Wall., 168, 181, is a decision by the United States Supreme Court, growing out of an action commenced in Colorado. The court expresses itself in relation to the power of a state to exclude foreign corporations, as follows:

"* * * Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of

course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion." * * *

I have no doubt the International Correspondence School is doing good work. It is controlled by the International Text Book Company, which controls most of the text-books used in our public schools. It is immaterial whether the International Correspondence School pays dividends on its stock or not. The law of Colorado provides that it must pay a fee on its entire capital stock if it wishes to come into our State, establish an office here and carry on business from that office.

If the school confines its headquarters to its parent state it has the right to conduct business in all the sister states of the Union by correspondence, and no state has the right to exclude it from carrying on business by correspondence. To undertake to regulate and control a business conducted by correspondence would be an interference with interstate commerce. This is beyond the control of any state.

Paul vs. Virginia, 8 Wall., 168;

Utley vs. Clarke Gardner L. M. Co., 4 Colo., 369;

Cooper Mfg. Co. vs. Ferguson, 7 Sup. Ct .Rep., 739 and citations.

It will be necessary for you to determine whether the corporation has set itself up in business in Colorado without filing its articles of incorporation. If it has conducted its business in this State from an office situated in Denver instead of from an office located in the parent state, I am of the opinion that you have the right to prohibit the continuation of that office until it pays the required fee.

Respectfully submitted,

N. C. MILLER,
Attorney General.

COUNTY OFFICERS—VACANCIES—SUCCESSORS.

In case of a vacancy in the office of county commissioner the Governor shall fill the same by appointment, and if there be a vacancy in the office of county treasurer, or any other county office, the board of county commissioners shall fill the same by appointment, and the persons appointed to fill said vacancies shall hold until the next general election, or until the vacancy be filled by election according to law. Appointees can hold office until successors are duly qualified.

August 28, 1906.

MR. I. S. SMITH,
Attorney-at-Law,
Fairplay, Colo.

Dear Sir—In your letter of the 22d inst. you state that in January, 1905, the board of county commissioners of Park county appointed a successor to the regularly elected county treasurer of said county, who, previously thereto, had died.

Also, that in the year 1906 the Governor appointed a successor to a regularly elected county commissioner, who was elected in the fall of 1904 for a term of two years, and who thereafter removed from the county.

Upon said statement of facts, you submit for an opinion the following question:

"Should we nominate and elect at the coming election a county treasurer for a short term, to wit, until January, 1907, and also for the term of two years beginning January; and is the like true in respect to the county commissioner; or do the present incumbent appointees serve until January, 1907, whereby it becomes unnecessary to elect for the so-called short term?"

In answer to your request, I beg to say that the constitutional and statutory provisions bearing upon the question presented are as follows:

Article XIV, section 9, of the Colorado Constitution provides:

"In case of a vacancy occurring in the office of county commissioner, the Governor shall fill the same by appointment; and in case of a vacancy in any other county office, or in any precinct office, the board of county commissioners shall fill the same by appointment; and the person appointed shall hold the office until the next general election, or until the vacancy be filled by election according to law."

Article XII, section 1, of our Constitution provides:

"Every person holding any civil office under the State, or any municipality therein, shall, unless removed according to law, exercise the duties of such office until his successor is duly qualified; but this shall not apply to members of the General Assembly, nor to members of any board or assembly, two or more of whom are elected at the same time; * * *."

It is also provided by the statute as follows:

"In case of a vacancy occurring in the office of county commissioner, the Governor shall fill the same by appointment, and the person appointed shall hold the office until the next general election or until the vacancy be filled by election according to law."

See section 790, 1 M. A. S., page 750.

Section 888, 1 M. A. S., page 778, provides:

"In case the office of county treasurer shall become vacant, the board of county commissioners shall appoint a suitable person to perform the duties of such treasurer; and the person so appointed, upon giving bond, with like sureties and conditions as that required in county treasurers' bonds, and in such sum as said board shall direct, shall be invested with all the duties of such treasurer, until such vacancy be filled or such disability removed."

There can be no doubt that at the coming November election there should be elected for the regular term beginning in January 1907, a county treasurer and also a county commissioner.

As the said November election will be the next general election after the aforesaid vacancies occurred, I am of the opinion that it would be legal also to elect then some one to fill the unexpired or short term of each office.

However, if no election shall be held for said short or unexpired terms, I think the said appointees or present incumbents of said offices would be entitled to hold over until January, 1907, when they would be succeeded by the officers elected to said positions for the regular term.

Yours truly,

N. C. MILLER,
Attorney General.

By W. R. RAMSEY,
Assistant Attorney General.

COUNTY TREASURER.

A county treasurer is not authorized to retain fees for the collection of State taxes.

April 11, 1906.

HON. JOHN A. HOLMBERG,
State Treasurer,
State Capitol.

Dear Sir—You have submitted to this office letters from the State Auditor and Howard H. Dawson, county treasurer of Dolores county, showing that said Dawson, as such county treasurer, has retained certain fees for the collection of State taxes.

In compliance with your request for an opinion as to whether or not said county treasurer is entitled to such fees, I beg to say that section 10, chapter 134, Session Laws 1894, provides:

"The county treasurers of the several counties of this State shall receive as their only compensation for their services, an annual salary, to be paid quarterly out of the fees, commissions and emoluments of their respective offices, and not otherwise."

The act in relation to public revenue, adopted March 22, 1902, provides that:

"No expenses incurred in the assessment or collection of taxes shall be paid by the State, except as otherwise provided herein."

Session Laws 1902, section 4, page 44.

I am unable to find any provision in said act which authorizes the payment of fees by the State for the collection of taxes.

On the contrary, section 202 of said act makes each county responsible to the State for the full amount of taxes levied for State purposes, except in case of erroneous assessments or in cases where the same are found to be illegal, etc.

Session Laws 1902, page 146.

I am therefore of the opinion that the deductions so made by said county treasurer are unauthorized by law.

Yours truly,
N. C. MILLER,
Attorney General.

By W. R. RAMSEY,
Assistant Attorney General.

DINING CARS.

Dining cars not liable for $25.00 license fee provided for in Revenue Act of 1902.

May 5, 1906.

HON. JOHN A. HOLMBERG,
State Treasurer,
State Capitol.

Dear Sir—I have your request for an opinion concerning the liability of dining cars for the payment of the license fee provided for in section 3810, M. A. S. (R. S.)

This statute provides that every person, company or corporation * * * for each and every saloon, restaurant, hotel, club, drug store, liquor store, or other place where liquor is sold, shall pay a $25.00 license fee.

The word "dining car" is not included in any of these descriptive terms, and the word "other place" includes anything similar to those designated in the act. For instance, it is quite probable that a "dining car" is similar to a "restaurant," and therefore would be included, if no other law prevented. But we have a special statute, found at section 283 of M. A. S. (R. S.), reading as follows:

"Any person or corporation operating hotel cars, dining cars, or buffet cars, upon any railroad, shall have the right to sell cigars, wines, liquors and beverages of all kinds to passengers traveling upon any train to which such car may be attached, without obtaining from any town, city, county or state, license as liquor dealer or otherwise; *Provided,* That wines, liquors and beverages shall be sold only to passengers on the train upon which the same may be sold for the use of such passengers while upon the journey."

This statute was passed in 1891, and the revenue act imposing the $25.00 tax was passed in 1902. There is no express repeal found in the latter act and repeals by implication are not favored, and where it is to be gathered from all the facts and circumstances concerning the respective acts of the Legislature, that it did not intend one to repeal the other, a court would not hold that a previous act was repealed.

At the time the Legislature passed the first act, there was no State license, and yet the Legislature expressed that dining cars should be exempt from a State license. This act is careful to mention that dining cars are exempt from all forms of license imposed by the State, county, city or town. It is a special statute, and passed evidently for the reason that dining car service

will not afford the expense of the various liquor licenses imposed by the State and its agencies.

Moreover, it is a special statute, and will not be repealed by a general statute unless there is such an apparent conflict that one or the other must fall, and this does not appear to be the case in this instance. In fact, there is no conflict that would interfere with both statutes being given effect.

It is therefore my opinion that dining cars are not subject to the $25.00 license tax.

Respectfully submitted,

N. C. MILLER,
Attorney General.

DISTRICT ATTORNEYS—COMPENSATION—REPORT.

District attorneys are required to file an annual report with the Secretary of State, embracing all the earned fees of their office, including the fees earned by their deputies. Compensation limited.

January 25, 1905.

HUGO SELIG, ESQ.,
District Attorney,
Montrose, Colorado.

Dear Sir—I have your letter of the 21st inst., in which you request an opinion from this office relating to the compensation of district attorneys, as provided in sections 1936i and 1936j, of Mills' Annotated Statutes. You also submit the following questions, to wit:

1. Are all the earned fees of the office of district attorney, including the fees earned by deputies, the fees contemplated by the statute, of which he must make a report?

2. Is the whole salary of the office of district attorney, including the fees earned by his deputies, limited to the sum of three thousand dollars?

Section 1936i provides that:

"Each district attorney shall, at the end of each year of his term of office, render a true and correct itemized statement, under oath, to the Secretary of State, which statement shall be filed and preserved in the latter's office, of the fees received by him as district attorney for the preceding year, and the surplus received by him (if any) over and above the annual sum herein limited, shall

be repaid to the county treasurers of the several counties of his district, each such county to be repaid such proportionate sum of such surplus as the amount each has paid him during such year shall bear to the whole fees collected in the district by him."

While the statute does not expressly direct that a report shall be made of the fees earned by deputies, I am of the opinion that it is the duty of the district attorney to include such fees in the statement made by him. From a legal standpoint the deputy is the agent, and whatever is done by him is considered as the act of his principal.

So, in answer to your first question, I would say that it is the duty of the district attorney to include in the annual statement required by the law to be made by him to the Secretary of State, all the earned fees of the office of district attorney, and all the fees earned by his deputies.

In answer to your second question, I am of the opinion that it is the intention of the statute to limit the full compensation of the district attorney of your class to the sum of three thousand dollars per annum. He is not allowed for his individual services, including the salary paid by the State and all fees earned by himself and his deputies, to receive more than said sum.

Section 1936j limits the compensation for services rendered by deputies to the sum of two thousand dollars annually to each deputy, payable out of the fees of the office of the district attorney. It is provided, however, that such compensation shall not be allowed in excess of the sum approved in writing by the district attorney of such district.

In other words, I think it is made the duty of the district attorney to include in the annual statement required to be made to the Secertary of State, all fees earned by himself and his deputies for the preceding year. Then the surplus over and above the compensation to himself, limited to the said sum of three thousand dollars, and the compensation of his deputies, fixed as required by section 1936j and payable out of the fees of the office of the district attorney, shall be repaid, as required by law, to the county treasurers.

Inasmuch as the law makes provision for the collection of all the earned fees by the district attorney, it is fair to presume that all the fees earned by said office have been received, or, at least, could have been collected by proper diligence on the part of said officer.

By section 699, 1 M. A. S., provision is made for the payment of costs in criminal cases by the county in which the offense is committed when the defendant shall be convicted and is unable to pay them. The record should be made to show in every criminal case either that the defendant is insolvent or a judgment against him for costs. This is usually done after the jury retires to consider its verdict, by placing some competent witness on the stand

to testify concerning the possibility of satisfying an execution against the defendant for the costs in the case.

Trusting that the above fully answers your inquiry, I am

Respectfully yours,

N. C. MILLER,
Attorney General.

By W. R. RAMSEY,
Assistant Attorney General.

DISTRICT ATTORNEY.

January 5, 1905.

MR. J. B. MALL,
Chairman Board County Commissioners,
Hahn's Peak, Colo.

Dear Sir—In reply to your letter of the 5th inst., in regard to the appointment of a deputy district atorney in counties having a population of less than 25,000 people, I beg to say that, in my opinion, 1 M. A. S., 1553, gives each district attorney the power to appoint—that is, select—a deputy in each county of his district, subject, however, to the decision of the county commissioners as to whether a deputy is necessary or desired in such county.

The choice of a person to fill an office constitutes the essence of an appointment, and the selection must be the discretionary act of the official clothed with the power of making the appointment.

19 Am. and Eng. Enc. Law, 423.

It will be noticed that the title of this act is, "An Act to Authorize the District Attorneys in This State to Appoint One or More Deputies," and the enacting clause is to the same effect; and the appointment becomes operative, subject only to two conditions: *First*, that the county commissioners of counties with less than 25,000 people shall decide whether or not a deputy is necessary or desired; and, *second*, that the deputy shall file a bond and take the oath of office.

No logical reason is apparent why the Legislature intended county commissioners in counties of less than 25,000 inhabitants should assist in selecting the deputy, when such power is not given to them in counties of over 25,000 inhabitants.

On the other hand, the same reason appears for allowing county commissioners in counties of less than 25,000 inhabitants to say whether or not a deputy district attorney is required in

such counties, as for the Legislature to say that not more than one deputy shall be appointed therein, instead of one or more in counties of over 25,000.

In regard to the appointment, in counties of 100,000 inhabitants and under, of a deputy district attorney in County Courts in juvenile cases, section 4, page 180, of the Session Laws of 1903, vests in the district attorney alone the power to make this appointment, subject, however, to the provisions of chapter 101 of the same Session Laws, as to the amount of his salary.

As to the question of having two deputies—one under the juvenile law and the other under section 1553, *supra*—the latter is subject, as before stated, to the action of the county commissioners as to whether or not one is required, and the former appointment rests exclusively with the district attorney, subject, however, to chapter 101 of the Session Laws of 1903, as to the amount of salary.

As to the question of the proper manner of showing the consent of the board of county commissioners to the appointment of a deputy district attorney in counties containing less than 25,000 inhabitants, the better rule seems to be that the consent should be shown by a resolution duly passed and entered at length upon the records of the board.

After the resolution has been spread upon the records, the district attorney may select and appoint a deputy, or remove the one and appoint another whenever he desires, without consulting the board, so long as the resolution consenting to the appointment remains in force.

It must be borne in mind that, as the board of county commissioners has the power of determining when such an office shall exist in that particular county, it has also the right to determine when such an office is no longer necessary, and, though the term of the incumbent has not yet expired, may revoke the former resolution and abolish the office.

23 Am. and Eng. Enc. Law (2d Ed.), 403-5.
In re Senate Bill, 12 Colo., 339.
Ford vs. Board, etc., 81 Cal., 19.

Respectfully submitted,

N. C. MILLER,
Attorney General.

By I. B. MELVILLE,
Assistant Attorney General.

EIGHT-HOUR LAW.

Is a driver in a coal mine protected under the eight-hour law?

June 23, 1905.

MR. OLIVER AMOS,
Rockvale, Colo.

Dear Sir—In reply to your request for an opinion as to whether a driver in a coal mine is covered by the eight-hour law recently enacted, I desire to say:

The answer to your question requires a definition of the word "miner," and my judgment is that the court will give to it the meaning in harmony with the use of the word by those engaged in coal mining.

Do miners generally understand that a driver is a miner? And is he so considered by the coal miners? The law was enacted for the benefit of miners, and the terms of the act will be construed according to the common use made of them in the business and occupation of mining.

I am unable to throw any further light upon the question.

Yours truly,
N. C. MILLER,
Attorney General.

ELECTIONS.

The statute requiring certificates of nomination to be filed by the chairman and secretary of convention within five days is to secure prompt action on their part.

Upon failure to so file, the proper persons in interest may compel filing.

September 20, 1906.

MR. J. N. PETTINGILL,
County Clerk Grand County,
Sulphur Springs, Colo.

Dear Sir—I have your letter of September 17th, asking me for the construction of section 1625, Mills Ann. Stat., Revised

Supplement, concerning the filing of certificates of nominations of county officers.

The statement is made that the chairman and secretary of the Republican convention of your county failed to file their certificate within five days after the nominations were made, and you wish to be advised if the same is now tendered you for filing.

I quote from this section, as follows:

"All certificates of nominations made by conventions shall be filed in the proper offices not later than five days after the date of such nominations."

I am inclined to think that the purpose of this act was to require the duty to be performed by the chairman and secretary without delay, and is not designed as a penalty to be inflicted on the nominees for the failure of the chairman and secretary. I do not think it was the intention to invest the chairman and secretary with the power to cause a forfeiture of the nominations by a failure on their part.

I believe the proper construction of this act would be to hold that if the chairman and secretary did not file the certificate of nomination within five days, a proper proceeding can be brought to compel them to do so. In other words, they must do so not later than five days. I can see no purpose to be served by this provision, except to require promptness of action by the chairman and secretary.

However, I have already advised the chairman and secretary to convene the convention and make the nominations as original ones, and file the certificate within five days, along with the resolution of the convention authorizing the chairman to reconvene it.

The correctness of the minutes of the proceedings of the convention are not within the control of the courts, and if such certificate is tendered to you, it is my opinion that it should be filed.

The requirement to file within five days is for the protection of the People and the candidates, and was not designed to forfeit the rights of either in case the chairman and secretary should be negligent. But the other course is open to this convention—that is, to renominate as original candidates, and, therefore, the question at present may be avoided.

Yours truly,

N. C. MILLER,
Attorney General.

EQUALIZATION—POWER TO RAISE ASSESSMENTS.

A County Board of Equalization has power to adjust and equalize the valuation of the property set forth in the assessment roll for such county, but has no power to raise assessments made by the assessor, without regard to adjustment or equalization, because said board considers said assessment too low.

September 12, 1905.

MR. JOHN T. ROSS,
County Commissioner,
Fort Morgan, Colo.

Dear Sir—In answer to your verbal request made yesterday for an opinion as to whether your county board of equalization has the power to raise some assessments which, in the judgment of the board, the assessor has made too low, without making a corresponding decrease in others, I beg to say that the statute defining the powers and duties of the county board of equalization may be found in sections 92 and 213 of "An Act in Relation to Public Revenue," approved March 22, 1902.

Section 213 of said act provides that the county commissioners of each county shall constitute a board of equalization for the adjustment and equalization of the assessment among the several taxpayers of their respective counties. It is made the duty of the board to notify the assessors to supply any omissions in the assessment roll which may come to their notice, and in case any material changes are made or directed by said board in the assessment of any person or persons, the county clerk shall notify such person or persons by mail of such change, and it is provided that the board shall, at its second meeting, sit to hear complaints only from those dissatisfied with said changes, and to adjust the assessment so as to equalize the same among the several taxpayers of the county. See Session Laws 1902, section 213, page 149.

Section 92 of said act provides:

"The power of said board shall be to adjust and equalize the valuation of the property set forth in the assessment roll, and it shall exercise no other power and shall have no other authority in the premises."

It is also provided in said section that the board shall have no power whatever to make any increase or decrease in the total amount of the valuation of the property of the county as set forth in the assessment roll, except as an incident to equalization. However, where it appears in one or more instances that

an item or items of property in any given class is assessed above its true value, and it shall also appear that all other items in such class are assessed at their true value, then, in such case, and in such case only, said board shall abate the excess valuation. See section 92, Session Laws 1902, page 91.

According to my construction of the statutes relating to said subject, I do not understand that the county board of equalization has the power to revise or change the assessments made by the assessor by raising the same because in the judgment of the board said assessments are too low, for, if that were done without regard to adjustment or equalization, the result would be to increase the total amount of the valuation of the property of the county set forth in the assessment roll, which the law expressly provides shall not be done.

Respectfully yours,
N. C. MILLER,
Attorney General.

By W. R. RAMSEY,
Assistant Attorney General.

ELECTIONS—LEGAL RESIDENCE.

One does not acquire a residence in this State by the mere act of filing upon government land. He must locate or settle upon the land with the intention of making it his permanent home and continue to reside there the length of time required by law in order to become a voter.

September 27, 1906.

HON. MILTON SMITH,
Denver, Colo.

Dear Sir—I am in receipt of your letter containing substantially the following statement:

A number of people came into this State about a year ago and filed on government lands. After making said filing they immediately left the State, and at a period of about five or six months later they returned to make their improvements.

The question presented by you, and upon which you desire an opinion, is whether or not such persons are entitled to claim residence in this State from the time they first came, and made their filings, or whether their residence dates from the time they came into the State to make improvements upon the land, and also whether such persons would be entitled to be registered and to vote.

As I understand the law, it is not necessary, in order to file upon government lands, that one shall reside upon the land or within the State at the time of said filing. He may or may not so reside. The requirements of the law as to the acquisition of a homestead are given in 26 Am. and Eng. Enc of Law (2d Ed.), page 254, as follows:

"A homesteader, in order to perfect his rights, must, if not settled upon the land at the time of making his entry at the Land Office, within six months thereafter establish his actual residence in a house upon the land, and must continuously reside upon, cultivate and improve the land for five years."

See, also, General Circular of January 1, 1889, set forth in Copp's Public Land Laws, volume 1, page 339 et seq.

In the cases mentioned by you the parties did not reside upon the land or in the State at the time of making their entry or filing at the Land Office. After filing, they did not remain in the State, but immediately thereafter left the State and did not return until five or six months later. The mere act of filing upon government land does not make one a resident upon the land, or of the State in which the land is situated.

I am of the opinion that the persons you mention did not, at the time of filing, acquire a residence here, either under the government homestead laws or the laws of the State, and that their residence must date from the time when they returned to make their improvements and actually settled upon the land with the intention of making it their permanent home; and that they are not entitled to be registered and to vote, even if otherwise qualified, until they have continued to reside in the State the length of time required by law.

Trusting that the foregoing fully covers the points presented in your letter, I am,

Yours truly,

N. C. MILLER,
Attorney General.

By W. R. RAMSEY,
Assistant Attorney General.

EXAMINATION OF BOOKS OF DEPARTMENTS.

The Governor has not the power under the Constitution and statutes of Colorado to appoint a person to examine the books of all the departments of the State. The law, however, authorizes him to call upon them for a written statement of the condition of affairs.

December 14, 1904.

HON. JAMES H. PEABODY,
Governor of Colorado,
Capitol Building.

Dear Sir—Replying to your oral request to further consider the question as to whether or not you possess the authority to appoint a committee or board to examine into and report to you upon the present condition and management of the various offices of the Executive Department of State, and what, if any, authority such a board would possess after its appointment, I beg to say that section 1, article IV, of the Constitution provides that certain enumerated officers shall constitute the Executive Department.

It has been held that the purpose of the above provision of the Constitution was to provide for such officers of the Executive Department as the members of the constitutional convention deemed absolutely indispensable, and that it is within the power of the Legislature to create new and additional executive officers.

Parks vs. Soldiers' and Sailors' Home, 22 Colo., 86, 94.
People vs. District Court, 29 Colo., 182, 193.

Excepting, possibly, the Governor, the various officers constituting the Executive Department are, no doubt, all of equal dignity in the eyes of the law, and any authority of one to inquire into the management of the affairs of another department must be sought either in the Constitution or the statutes of the State.

Section 2, article IV, of the Constitution provides that:

"The supreme executive power of the State shall be vested in the Governor, who shall take care that the laws be faithfully executed."

"The Constitution makes it the duty of the Governor to 'take care that the laws be faithfully executed;' but the Governor, in performing this duty, has no arbitrary power; he must proceed according to law."

Hanley vs. Wetmore, 6 Atl. (R. I.), 777, 780.

The Governor is referred to by the Supreme Court as the head of the Executive Department, in People vs. District Court, 29 Colo., 182, 192.

Section 5, article IV, of the Constitution provides that:

"He shall have power to call out the militia to execute the laws."

"Under this provision of the Constitution, the phrase 'to execute the laws' contemplates the enforcement of a judicial process —that is, the enforcement of a right or remedy provided by law and judicially determined and ordered to be enforced, and not an arbitrary enforcement by the executive of what he may consider the law to be."

In re Fire and Excise Commrs., 19 Colo., 482, 503.

The powers and duties of the Governor, as well as those of other executive officers, must be sought for in the Constitution and statutes of the State.

Section 8, article IV, of the Constitution provides:

"The Governor may require information, in writing, from the officers of the Executive Department, upon any subject relating to the duties of their respective offices, which information shall be given under oath whenever so required; he may also require information in writing at any time, under oath, from all officers and managers of State institutions, upon any subject relating to the condition, management and expenses of their respective offices and institutions. The Governor shall, at the commencement of each session, and from time to time by message, give to the General Assembly information of the condition of the State, and shall recommend such measures as he shall deem expedient."

"And, conversely, it is your duty to require such information whenever the circumstances seem to you to demand such requisition."

Report of Atty. Gen. Jones (1889-'90), page 26.

Section 17, article IV, of the Constitution provides:

"The officers of the Executive Department, and of all public institutions of the State, shall, at least twenty days preceding each regular session of the General Assembly, make full and complete reports of their actions to the Governor, who shall transmit the same to the General Assembly."

Section 1806 of M. A. S. provides that the Governor shall semi-annually appoint a committee of three to examine the books and accounts of the State Treasurer.

Sections 1843 to 1846 provide that, upon the death or resignation of the State Treasurer, or upon a vacancy in that office

from any other cause, the Secretary of State and two persons to be appointed by the Governor shall take charge of the moneys and papers in the Treasurer's office, prepare an inventory thereof and safely keep the same until another Treasurer shall be appointed.

A Territorial statute, still in force, and applicable to the State Auditor and Treasurer, provides that:

"The Governor of the Territory may at any time examine all the public books, papers, accounts and vouchers of the Territorial Auditor and Treasurer; and for such purpose the said officers are required to give the Governor full and free access to their said books, papers, accounts and vouchers, whenever notified by him that he desires to make such examination."

1 M. A. S., section 1834.

This statute applies only to the offices of the Auditor and Treasurer and does not extend to other executive officers or departments.

While the Auditor is made the chief officer of the Insurance Department, yet the statute expressly declares that the Insurance Department shall be a separate and distinct department.

1 M. A. S., sections 2201-2202.

The governor of Rhode Island, having officially advised the Supreme Court of that state that representations had been made to him of malfeasance and nonfeasance in the management of the state prison and some of the other penal institutions of the state under the charge of the board of state charities and corrections, and of the inconvenience, if not impossibility, of his making a personal inquiry into the truth of the charges, requested the opinion of that court as to his power to appoint and commission persons to make inquiry into the truth of such representations.

It was held by the court that the governor had power to appoint or employ persons to make the inquiry for him and to report the facts; that the persons so appointed had no power to administer oaths, summon witnesses, compel them to testify or punish for contempt, and that the report of the commission of the facts elicited by them would be regarded as a privileged communication, and as such would not be actionable without proof of express or actual malice.

In re Investigating Committee, 16 R. I., 751; 11 Atl., 429.

Randall vs. State, 16 Wis., 340.

Section 8, article XII, of the Constitution authorizes the District Court of the county wherein the seat of government may be to appoint committees to investigate the official accounts and affairs of the State Treasurer and Auditor of State.

Sections 1840-1842 provide for the appointment by the Secretary of State of a committee consisting of one Senator and two Representatives to examine and verify the accounts of the Auditor and Treasurer, and make to each house of the General Assembly a report thereof.

Information may be obtained by you, or investigations may be made by you, in the manner provided by the above cited constitutional and statutory provisions. Neither the Constitution nor the statutes provide for the appointment by you of such a committee or board as you suggest; nor do they specify the powers, duties or compensation of such a committee or board.

Except as specified in the above cited constitutional and statutory provisions, such a committee or board, if appointed by you, would be without authority to enforce its investigation of any Executive Department against the objection of the head of that department.

The conclusions arrived at herein are in accord with the views expressed in a former official communication to you from this office.

Respectfully submitted,
N. C. MILLER,
Attorney General.

By CALVIN E. REED,
Assistant Attorney General.

EXAMINING COMMITTEE.

No compensation is allowed by statute to such committee except for a period not exceeding six days previous to the commencement of the session of the General Assembly. Double compensation not allowed.

April 8, 1905.

HON. FRANK PRYOR,
Pueblo, Colo.

Dear Sir—I am in receipt of a communication dated the 4th inst., signed by you and also by the Hon. J. F. Church and Hon. F. W. Frewen, requesting an opinion from this office as to the legality of certain claims enclosed therewith in favor of Messrs. Church, Frewen and yourself against the State of Colorado, for the sum of $609 each, for services from January 4, 1905, to April 1, 1905, inclusive, as members of the Joint Committee of the Senate and House of the Fifteenth General Assembly, appointed by

the Secretary of State to examine the accounts of the State Auditor and State Treasurer.

Said committee was appointed under section 1840, Mills' Annotated Statutes, which is as follows:

"Previous to each regular session of the General Assembly, the Secretary of State shall select and notify, by giving ten days' notice to one member elected to the Senate and two members elected to the House of Representatives, to attend at the seat of government six days before the commencement of the session, for the purpose of examining and verifying the accounts of the Auditor and Treasurer."

Section 1842, M. A. S., provides that, after such examination, a report thereof shall be made to each house of the General Assembly.

The compensation allowed said commissioners is fixed by section 1846, M. A. S., which provides that said commissioners "shall receive the same compensation as is allowed by law to the members of the General Assembly during the time they may be engaged in such service."

According to my construction of the statute, it was intended that the services required by section 1840 should be performed within six days previous to the beginning of the legislative session. While it is true that section 1846 provides that the members of said committee shall receive compensation during the time they may be engaged in such service, it was not contemplated by said enactment that compensation should be made to a member of the General Assembly, as such, and that he should also receive compensation as a member of a committee during the legislative session—in other words, double compensation was not intended.

Article V, section 6, of our State Constitution provides:

"Each member of the General Assembly, until otherwise provided by law, shall receive as compensation for his services, seven dollars ($7.00) for each day's attendance, and fifteen (15) cents for each mile necessarily traveled in going to and returning from the seat of government, and shall receive no other compensation, perquisite, or allowance whatsoever."

As your claim appears to be for balance due for services rendered as a member of the committee during a period wholly included within the legislative session, I presume you have received compensation for services performed during the six days previous to said session, and, as I understand it, that is all the law allows.

Therefore, I am of the opinion that said claims are illegal, and should not be approved.

Respectfully yours,

N. C. MILLER,
Attorney General.
By W. R. RAMSEY,
Assistant Attorney General.

EXEMPTION OF PERSONAL PROPERTY FROM TAXATION.

The exemption of personal property to the value of two hundred dollars now provided by law to the head of a family, is not in addition to that formerly provided by our Constitution as to household goods, but is in lieu thereof.

April 5, 1905.

MR. ALEX M. GORLA,
Assessor, Dolores County,
Rico, Colo.

Dear Sir—I have your letter of March 31, in which you request information as to the present exemption law.

In answer thereto I would say that formerly section 3, article X, of the Constitution of Colorado provided that the household goods of every person being the head of a family, to the value of $200, shall be exempt from taxation. But by a proposed amendment which was submitted to the qualified electors of this State, voted upon and carried at the November election, 1904, said section was so amended that instead of household goods to the value of $200 being exempt from taxation, as heretofore, it is now provided "that the personal property of every person being the head of a family, to the value of $200, shall be exempt from taxation."

This exemption applies to any kind of personal property, and may include such property as you suggest, viz., cattle, horses, pianos, household furniture, etc., to the value of $200.

You will observe that this exemption is not in addition to that formerly provided on household goods, but is in lieu thereof. Said law is now in full force and effect and applies to assessments for 1905.

Yours truly,
N. C. MILLER,
Attorney General.

By W. R. RAMSEY,
Assistant Attorney General.

EXTRADITION.

The Governor has a right to recall a warrant issued for the extradition of a fugitive.

Duty of Governor to deliver fugitive fixed by the federal Constitution and statutes enacted by Congress and the laws of the State.

Extradition not a matter of comity between the States.

His power to deny or allow the request should be decided judicially, and not arbitrarily.

His decision is not subject to review.

August 24, 1905.

HON. JESSE F. McDONALD,
Governor of Colorado,
State Capitol.

Dear Sir—I am in receipt of your communication requesting an opinion as to the power of the Governor to recall a warrant issued in the matter of the extradition of an alleged fugitive from justice.

I am informed that one Alexander B. Funk has been arrested upon a charge of having obtained money under false pretenses in the state of Iowa. Application for his extradition has been made by the governor of the state of Iowa upon the chief executive of the State of Colorado, and, after consideration of the papers, a warrant has been issued commanding the sheriff of the county of Washington to arrest and deliver him to the agent of the governor of the state of Iowa, to be taken by the latter into the state of Iowa, for the purpose of trial for said offense. Representations of sufficient importance have since been made, which demand an investigation of the case, for the purpose of determining if the warrant should be withheld.

The matter having come up suddenly, and requiring immediate action, I advised you to recall the warrant, inasmuch as the agent of the governor of Iowa had not yet arrived, and the writ was still in the hands of the sheriff of Washington county. I promised that I would look into the matter fully and report to you the decisions bearing upon the subject, so that they might be made of record for guidance on future occasions.

EXTRADITION NOT A MATTER OF COMITY BETWEEN THE STATES.

The right of a sovereign of one nation to demand the extradition of a fugitive from justice who has escaped into another nation is regulated and controlled by treaty.

The right of extradition between the colonies, previous to the adoption of the Constitution, was regulated by one of the

articles of confederation. At the time of the adoption of the federal Constitution it was of such importance that a special provision was inserted covering the matter, which reads as follows:

"A person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime."

Article IV, section 2, sub-div. 2, Fed. Const.

The history of this constitutional provision is so well presented in *Hurd on Habeas Corpus* (2d Ed.), 599-637, and in the lengthy opinion rendered in the case of *Commonwealth of Kentucky vs. Dennison,* 24 How., 66, and in the admirable discussion contained in the *Brown Case,* 112 Mass., 409, and citations contained in those opinions, that it is not necessary to relate the history of it in this opinion. Reference is made to those cases, as well as to those which will be hereafter cited, as furnishing a full history of the act and statement of the principles on which extradition rests.

It has been held that this provision of the Constitution is not entirely self-executing, and that it is necessary to support it by additional legislation on the part of Congress. For instance, the provision fails to provide how a person should be charged with treason, felony, or other offense; moreover, it provided that on demand of the executive of the state from which he fled, he should be delivered up and removed to the state having jurisdiction of the crime. No provision was made as to the person upon whom the demand was to be made, or upon whom the duty devolved to deliver him up.

These defects led to much discussion of the meaning of the act, and the operation of it, and Congress, on February 12, 1793, passed an act to meet these deficiencies, and to render the constitutional provision fully operative. This legislation was afterwards slightly amended, and is now to be found in sections 5278-5279 of the Revised Statutes of the United States. These statutes have never been altered, and read as follows:

"Whenever the executive authority of any state or territory demands any person as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent

of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the state or territory making such demand, shall be paid by such state or territory."

"Sec. 5279. Any agent so appointed, who receives the fugitive into his custody, shall be empowered to transport him to the state or territory from which he has fled. And every person who, by force, sets at liberty or rescues the fugitive from such agent while so transporting him, shall be fined not more than five hundred dollars, or imprisoned not more than one year."

STATE LEGISLATION.

Federal legislation does not apply until the executive demands the delivery of the fugitive from the executive of the state or territory to which he has fled. Nor is it the duty imposed upon the executive of the state where the fugitive may be to cause his arrest and surrender until a demand is made in pursuance of these federal statutes. No provision is made under the federal act as to how his arrest and delivery shall be made; the procedure is not fixed. The law of Congress does not provide any machinery by which the governor of the state, to whom the demand is addressed, can be compelled to arrest and deliver a fugitive. The Constitution and federal legislation described a person to be delivered up as one who has fled from the state demanding, and to the state on which the demand is made, and yet the Constitution and legislation fail to specify the evidence upon which the material fact may be made known, either to the executive authority making the demand, or to the executive authority asked to make the delivery. The identity of the person arrested may be in dispute. Various personal rights may arise which give the right to apply for a writ of *habeas corpus*. The legislation of Congress has failed to meet all of these deficiencies; therefore, supplemental legislation has been made by most of the states, defining and fixing most of the procedure.

Chapter 56, M. A. S., contains the legislation enacted by the State of Colorado. Section 1 of this act provides that:

"Whenever the executive of any other state or of any territory of the United States shall demand of the executive of this State any person as a fugitive from justice, and shall have complied with the requisitions of the act of Congress in that case made and provided, it shall be the duty of the executive of this State to issue his warrant, under the seal of the State, to apprehend the said fugitive, directed to any sheriff, coroner or constable of any county of the State, or other persons whom the said executive may think fit to intrust with the execution of said process. Any of the said persons may execute the said warrant anywhere within the limits of this State, and convey such fugi-

tive to any place within this State which the executive in his warrant shall direct."

Other provisions follow concerning the mode of procedure.

REVOCATION OF EXECUTIVE WARRANT.

The law is settled that the executive has the right to recall a warrant so long as the prisoner is within the state or territory, and it does not matter if he is in the custody of the agent of the governor of the state making the demand. Enc. Law (2d Ed.), page 605.

The matter seems to have been adjudicated by the Supreme Court of the state of Ohio, in the case of *Work vs. Corrington,* 34 Ohio State, 64, or 32 Am. Rep., 345. This is a very able opinion, and I refer any person to the same who is desirous of examining the opinion of the court concerning many points frequently raised in matters of extradition. At page 353, volume 32, Am. Rep., the court said:

"If we should hold that the governor has no power of revocation where the objection only goes to the sufficiency of the papers, in matter of form, or the motives of the party complaining, the same result would follow. We have seen, in *Taylor vs. Taintor, supra,* that the governor has the authority to withhold the warrant where the fugitive is in custody, charged with the commission of crime in the state where he has taken refuge; it can not be doubted that he should also withhold it where it is made to appear that the requisition is a forgery; nor can any serious question be made if, in either of these cases, the warrant has inadvertently been issued, about his right to revoke the process. As the governor had power to revoke them for some causes, the court below properly held that no inquiry could be made on *habeas corpus* as to the particular ground upon which these warrants were revoked. Indeed, while the courts will discharge a fugitive on *habeas corpus,* where the proceedings in his case are void, neither the general nor state government will otherwise interfere with the governor in the discharge of his duty, or failure to discharge it, in cases of this sort. *Com. of Ky. vs. Dennison; Taylor vs. Taintor; State of Mississippi vs. Johnson,* 4 Wall., 475; *High on Ex. Rem.,* 120. *State ex rel. vs. Chase,* 5 Ohio St., 528, in no way militates against these authorities, for the doctrine was fully recognized in that case, that where the governor is vested with a discretion, his action can not be controlled by mandamus. In any view, therefore, the court below properly discharged the prisoners from custody."

On this same point I refer to the case of *Minnesota vs. Toole,* 69 Minn., 105, and *Spear on Extradition* (3d Ed.), pages 440 and 713.

DUTY OF THE GOVERNOR TO DELIVER FUGITIVE.

Perhaps more controversy has arisen over the power of the governor to refuse to issue his warrant for the arrest of a fugi-

tive, when proper application is made, than upon any other subject affecting the right to apprehend fugitives from justice. The federal Constitution provides what the governor shall do when the demand is made. The statute of our State provides that the executive shall deliver him up when demand is made in compliance with the act of Congress and the federal Constitution, and yet it is apparent that throughout the several states of the Union the chief executive has repeatedly refused to deliver up a person who is apprehended as a fugitive from justice. This refusal is made, notwithstanding the fact that the papers may be perfect in all respects. To what extent the chief executive is justified in refusing to deliver up the prisoner has not been defined by any decision. The case of *Work vs. Corrington,* supra, is probably the fullest and ablest discussion of this controversy. It is well known that executives refuse to deliver up persons who are fraudulently demanded for a crime set up in the papers, when, in reality, the prisoner is wanted for an entirely different and other purpose. The chief executives of Indiana, Montana and Massachusetts, in cases well known to the public, have refused to deliver up prisoners charged with crimes in other states, *when it was made to appear, upon creditable* and *worthy testimony,* that the alleged fugitive could not have a fair trial in the state from which he fled. These rulings are exceptions, and should only be made when the evidence is clear and convincing on this point; proof which would carry no conviction in the important affairs of life should not receive weight in making the refusal. The constitutional provision of the United States commands it as a duty to deliver up a prisoner; so do the statutes of Colorado, when the demand complies with the requisitions of the act of Congress and the legislation made in pursuance thereof.

When a person is indicted by a grand jury, and the application for requisition is accompanied by the affidavit of the prosecuting witness and of the prosecuting attorney that the criminal process of the court will not be used to aid in the collection of a debt, or for any private purpose, the federal Constitution and the laws of the United States and the State of Colorado demand something more than the urgent appeal of friends of the accused and statements of friends that the accused can not have a fair trial, or that the extradition is sought to collect a debt. Creditable proof should be submitted in support of such charges.

The executive of this State has frequently refused to deliver up the prisoner, where the papers failed to show that the crime has been committed under any law of the state from which the fugitive has fled; also, where the person sought to be extradited has not fled from the state making the demand. The delivery has been refused in many cases where it was made to appear, by creditable and convincing evidence, that the person was to be extradited for the collection of a debt, rather than for trial upon the charge named. Delivery has been refused in many cases

where the crime was committed long ago and has become stale, and no sufficient showing has been made to account for the delay in asking for the extradition of the alleged fugitive. Perhaps no one would undertake to set the limit as to how far the governor may go in hearing reasons for denying the warrant for extradition, but I think all will agree that the denial should not be made for trivial reasons, nor upon a character of proof which would not be entertained in any court of justice.

Where a person is charged with the commission of a grave crime, and a strenuous effort is made in his behalf by his friends, clear and convincing evidence should be furnished to justify a disregard of the federal Constitution and the legislation in pursuance thereof, and the legislation of the State of Colorado supplemental to the federal acts concerning extradition.

Touching these questions generally, I refer to the following decisions:

Gould & Tucker, Notes Rev. Stats. U. S., volume 1, page 987.

Webb vs. New York, 79 Fed., 161.

State of Minnesota vs. Justus, 55 L. R. A., 325.

State of North Carolina vs. Hall, 28 L. R. A., 59.

In re Sultan, 28 L. R. A., 294.

Ex parte Hart, 28 L. R. A., 801.

The latter case provides that an information can not be regarded as a substitute for an indictment, within the meaning of the statutes. The verification of an information will not be regarded as such an affidavit as is required by the federal statutes. The affidavit must be sworn to before a magistrate, which is commonly understood to be a justice of the peace. In many of the states district judges are invested with all the powers of justices of the peace for the purposes of holding preliminary examinations, and as conservators of the peace.

Reference is also made to *Simmons vs. Van Dyke,* 26 L. R. A., 33.

In the latter case it was held that the arrest and detention of a person can not be justified in a hearing upon a writ of *habeas corpus* by exhibiting the telegram from the authorities of another state, stating that they have a warrant for his arrest. Persons arrested in anticipation of a warrant from a sister state should be proceeded against in accordance with the statute of the state in which the fugitive is found. These statutes provide the manner of arrest and detention until the papers arrive.

"The principles laid down by the Supreme Court of the United States, though strongly stated and perhaps without the necessary qualification, has not by the states been practically understood to exclude legislation of this kind. Mr. Bishop, in his Criminal Law, volume 1, page 133, says that 'statutes have

been enacted in most, or all, of the states, authorizing the arrest of persons on the charge of being fugitives from the justice of other states, on warrant issued by a magistrate, in advance of the executive demand.' This, he says, has been done in the aid of the 'legislation of Congress and for purposes of domestic police.' Mr. Hurd, in his work on Habeas Corpus, page 636, suggests that 'such legislation by the states, when in no sense opposed to the law of Congress, may be rested upon the general police power of the states, which was so ably contended for by Mr. Justice Baldwin in his opinion delivered in the case of *Holmes vs. Jennison,* 14 Pet., 540."

Work vs. Corrington, 32 Am. St., 345, 353.

FUGITIVE FROM JUSTICE.

In the year 1878 requisitions were presented to Governor Cullom, of the state of Illinois, by the agent of the governor of Pennsylvania, demanding the surrender of two citizens of Illinois, charged with the crime of murder, committed in Pennsylvania, March 1, 1865. Governor Cullom rendered an opinion recalling the warrant and refusing to renew it. I desire to quote from this opinion, as it is referred to in very many decisions and text books as the leading discussion upon the subject of this paragraph. The opinion in full may be found at page 713, *Spear on Extradition.*

"It is urged by those who support the requisition of the governor of Pennsylvania that I have no discretion in the matter, but must surrender the men if the papers presented are regular on their face. And this is, to my mind, the most important question. Have I the right to consider any extraneous facts—the lapse of time, the passiveness of the public prosecutor of Pennsylvania, the hardships of respectable families in this state, or any other matter beyond the very letter of the record?

"The Supreme Court of the United States, in the celebrated case of *Kentucky vs. Dennison,* made use of language which would seem to justify the conclusion that the governor of a state to whom a requisition is presented, demanding the return of an alleged fugitive from justice, has only a ministerial duty to perform, and has no authority to look beyond the record. 24 How., 66."

* * * * * * *

"* * * But since the case of *Kentucky vs. Dennison,* the Supreme Court of the United States itself has conclusively shown that the words used by the court, in the case last cited, are not to be taken without qualififfication."

* * * * * * *

"It thus appears that the language used in *Kentucky vs. Dennison* is not unqualified, that an executive officer to whom a requisition is presented may do something more than inquire into the regularity of the record, and that, however regular the

record, there still may be impediments of which the executive of whom the demand is made must be the judge. I refer to this case, and to the practice in this and other states, for the purpose of showing that, whether my duties be regarded as purely ministerial or *quasi judicial,* I am not only empowered, but required to consider certain extraneous facts not appearing in the record presented to me.

"What facts I may inquire into, and what effect shall be given to such facts when established, may be matters of dispute, but I regard it as settled by the highest authority that I am not absolutely bound by the papers certified to by the executive of Pennsylvania."

* * * * * * *

"Now, it is certainly clear that, under this provision, two circumstances must concur before any person can be lawfully arrested in one state and forcibly sent to another. He must be charged with treason, felony, or other crime, and he must be a *fugitive from justice.* Neither fact is sufficient without the other. It may be admitted that the certificate of the governor of a state that a party has been charged with crime, when accompanied by a properly authenticated copy of the indictment or affidavit on which the prosecution is based, is conclusive proof of such fact. Under the Constitution, the judicial records of each state are entitled to full faith and credit in all the other states. If the records so certified are regular upon their face, the executive of the state to whom the demand is made has clearly no right to go beyond the record and inquire whether the accused is guilty or innocent. The fact that the accused is charged with crime is thus conclusively established. But the second jurisdictional fact still remains to be established.

"The federal Constitution does not prescribe the mode by which it shall be made to appear that the accused has fled from justice; nor does it in terms declare who shall determine the question. No judicial tribunal is appointed to consider or pass upon the question. It is customary to allege in the requisition that the party named is a fugitive from justice, and to accompany the statement with an affidavit to that effect. But no law requires this course, nor is the legal force of such an affidavit in any way defined. The governor issuing the requisition must determine that fact for himself in the first instance. It is not at all certain that a prosecution for perjury could be maintained if such affidavit were false. In the absence of any counter evidence, such an affidavit would ordinarily be sufficient, no doubt, and would be satisfactory to the governor on whom the demand was made. But is he concluded by such an affidavit? He does not know that it is true. Indeed, he may positively know that it is false. Can it be that, as to a matter not established by a judicial record, the governor on whom the demand is made is bound to accept *prima facie* evidence which he knows to be false, and disregard that which he knows to be true?

"After full deliberation, I am satisfified that as to the fact of the accused being a fugitive from justice, each governor must judge for himself. The fact is not determined by any judicial act or record, but is *in pais* purely. Whether a person is charged with crime is another matter, provable by records that import absolute verity, and therefore can not be inquired into. But whether he has fled from the state wherein the charge was made is an open question, for the determination of which the law has made no provision in terms."

* * * * * * *

"The attorney general of Pennsylvania advised the governor of that state that where a person departed from a state wherein he was temporarily sojourning to his ordinary and permanent residence in Pennsylvania, this was not fleeing from justice under the Constitution and acts of Congress. Lewis' Cr. Law, 266."

* * * * * * *

"Mr. Hurd, in his work on Habeas Corpus, says: 'There must be an actual fleeing from justice, and of this the governor of the state of whom the demand is made, as well as the one making it, should be satisfied.' "

* * * * * * *

"In my opinion Gaffigan and Merrick are no longer fugitives from justice, if they ever were so. Had they concealed themselves, or had there been any difficulty in ascertaining where they were, upon due inquiry by the officers of justice, my conclusion would have been wholly different. But I believe a man may, by long years of good conduct, and by showing himself to the world without concealment, outlive the character of a fugitive from justice, more particularly where the ministers of justice charged with his apprehension practically abandon the charge against him for nearly half the period of human life."

I also quote the following paragraph from Notes on the Revised Statutes of the United States, volume 1, by Gould and Tucker, page 989:

"The statute does not prescribe the character of the proof which must be adduced to show that the person demanded is a fugitive from justice; but such proof must be made before a writ can issue. The executive of the state or territory in which the accused is found must determine, in some legal mode, whether he is a fugitive from the justice of the demanding state. *Ex parte* Reggel, 114 U. S., 642. Whether the person demanded is a fugitive from justice or not is a question of fact which the governor upon whom the demand is made must decide, upon such evidence as he may deem satisfactory. How far his decision may be reviewed judicially in proceedings in *habeas corpus*, or whether it is not conclusive, are unsettled questions. Roberts vs. Reilly, 116 U. S., 80. To be a fugitive from justice it is not necessary that the party charged should have left the state in which the

crime is alleged to have been committed, after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun, but simply that, having within a state committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process, to answer for his offense, he has left its jurisdiction, and is found within the territory of another. Id.; *Ex parte* Brown, 28 F. R., 653."

While the same authorities are strong that the executive has no right to withhold the warrant when papers are presented which comply with the federal Constitution and the legislation in support of it, nevertheless the practice in all the states shows that the governors have granted hearings on matters extraneous to the papers so often and repeatedly for years, that it may be said to be a right to investigate fully a case before honoring a requisition. I do not regard the statute as imperative unless the case complies with all the conditions of the constitutional provision and the statutes enacted in support thereof.

And evidence may be taken to aid the governor in determining if a proper case is made out. Where a crime has been committed and the person arrested is probably guilty, as shown by the papers, competent testimony should be offered to overcome the presumption in his favor.

Respectfully submitted,

N. C. MILLER,
Attorney General.

EXTRADITION.

Abandonment and non-support of wife and children an extraditable offense, even when defendant immediately leaves the State.

June 6, 1905.

HON. JESSE F. McDONALD,
Governor of Colorado,
State Capitol.

Dear Sir—I have carefully examined the requisition made upon your Excellency by the governor of the state of Nebraska for the return of James I. Randle, an alleged fugitive from the justice of that state, against whom a complaint was regularly made before a justice of the peace and a warrant issued thereon; and I find the requisition papers to be in substantial compliance with the rules of practice in interstate extradition matters.

In the hearing allowed to the parties by your Excellency in this matter, it was claimed by Mr. Randle and his counsel that the former was not a fugitive from justice, for the reason

First: That the offense complained of, and for which his rendition is demanded, was committed against his wife, and that it was admitted in the accompanying affidavit that his wife consented to his leaving the state; therefore, as the injury was to her personally, he was not a fugitive from justice; and,

Second: That as the offense was a statutory one, composed of two necessary ingredients, to wit, (a) abandonment, and (b) wilful neglect or refusal to maintain or provide for his wife or children; and,

As the complaint and affidavit show that the abandonment took place on the 16th day of January, at which time he left the state of Nebraska, and has been absent ever since, necessarily the wilful neglect or refusal to maintain his wife must have been committed without the state, and thus the crime was not committed within the state of Nebraska.

As to the first proposition—admitting it to be true that the wife, when an offense has been committed against her, by consenting to the husband leaving the state, prevents his becoming a fugitive from justice (of the correctness of which position I am in grave doubt), still, in this complaint are two counts—one for the abandonment and non-support of the wife, and the other for the abandonment and non-support of the two children.

Each of these offenses is made a separate and distinct offense by the statutes of Nebraska, and, even if the wife could consent to the offense against her, she certainly has no right to consent to this offense being committed against the children, and for the latter offense Mr. Randle would be a fugitive from justice (providing, of course, that an offense was committed), as he admits that he has concealed from his wife the fact of his being in the State of Colorado since the 16th of January, because of her threats to have him arrested if he should leave the state of Nebraska.

As to the second proposition—Mr. Randle admits that he left his wife and children in the state of Nebraska, without any money or means of living, except such as could be obtained from the proceeds of a pool-room, which was heavily mortgaged and which was later foreclosed, and, in addition, he admits that their household furniture was also mortgaged.

It is undoubtedly true that neglect or refusal to support a family is a continuing offense. Still, I am of the opinion that, notwithstanding this fact, if at the time of leaving his family, on the 16th of January, the alleged fugitive then and there intended to abandon them and to furnish them no further support or maintenance, an offense, within the meaning of the statute, was committed.

While, in honoring or refusing this requisition, these two questions should be taken into consideration and decided by your Excellency, yet, by the better authorities, your decision in these particulars can be reviewed by the courts of this State on a writ of *habeas corpus*. So, the accused, if not satisfied with your decision in the premises, can still apply to the courts.

For the above reasons I would recommend that the requisition be honored and the accused be returned to the state of Nebraska for trial in accordance with the laws of that state.

Respectfully submitted,

N. C. MILLER,
Attorney General.

By I. B. MELVILLE,
Assistant Attorney General.

EXTRADITION.

Application for extradition of a fugitive from justice in the Indian Territory should be addressed to the territorial judge of the district where he is arrested or located.

August 28, 1905.

HON. FRED W. PARKS,
Acting Governor of Colorado,
State Capitol.

Sir—At the time the application was presented to you for requisition papers, upon the proper authorities of the Indian Territory, for the extradition of one James A. Hill, charged with the statutory offense of larceny as president of the Denver Savings Bank, I was in grave doubt as to the person or persons to whom the papers should be addressed. Nevertheless, the matter was one of haste and I recommended that they be made out to the judges of the territory and to the secretary of the territory. They were so made out and have been honored by the judges of the Indian Territory.

I have since investigated the subject thoroughly, so as to be advised how to act in case of future applications of the same nature.

The act of Congress of May 2, 1890, section 41, concerning Oklahoma, provides as follows:

"Section 41. That the judges of the United States Court in the Indian Territory shall have the same power to extradite persons who have taken refuge in the Indian Territory, charged

with crimes in the states or other territories of the United States, that may now be exercised by the governor of Arkansas in that state, and he may issue requisitions upon the governors of the states and other territories for persons who have committed offenses in the Indian Territory, and who have taken refuge in such states and territories."

Section 41, U. S. Stats. at Large, volume 26, page 99.
Federal Stats. Ann., volume 3, page 415, chapter entitled "Indians."

The statute is also passed on in the fourth assignment of errors in the case of Ex parte Dickson, 69 S. W. Rep., 947.

As some uncertainty may exist as to the district judge in charge of the district where the fugitive is arrested, I would think it would be well to address the papers to the justices of the District Court of Indian Territory, if it is impossible to name the special judge presiding over the district where the party is arrested. Then there is always the possibility of this particular judge being absent from the territory, and there may be the necessity of presenting it to the chief justice, or some other justice. The division of the territory into judicial districts is for the convenience of the judges, and is not a limitation upon the jurisdiction of any particular judge or court.

I would, therefore, advise that the papers be made out to the justices of the District Court of the Indian Territory.

Respectfully submitted,

N. C. MILLER,
Attorney General.

EXTRADITION.

Requisition papers, for a fugitive from justice, complying with the requirements of the Act of Congress, in such cases made and provided, may properly be honored.

August 9, 1905.

HON. JESSE F. McDONALD,
Governor of Colorado,
State Capitol.

Sir—I have carefully examined the requisition and accompanying papers from the governor of the state of California upon the Governor of the State of Colorado for the extradition of Charles Shumway, an alleged fugitive from justice, charged with the crime of rape, alleged to have been committed upon Ruby

Bryant, a female under the age of sixteen years, in the county of San Diego, state of California, the said Shumway now being in the city of Denver, Colorado, which papers were submitted to this office by your Excellency for an opinion as to their sufficiency.

Upon the hearing which was given by you to the parties concerned, two objections were urged in behalf of the alleged fugitive to the validity of the requisition, viz.:

First: That the complaint was not made before the proper authority;

Second: That no satisfactory reason was given for delay in making the application.

The papers show that the complaint was sworn to by Ruby Bryant before M. B. Anderson, justice of the peace of the city of San Diego, and acting justice of the peace of the township of San Diego, California, and that the warrant against Shumway was issued and signed by said Anderson under section 1427 of the Penal Code of California. The complaining witness, Ruby Bryant, also made an affidavit before Milton R. Thorp, justice of the peace of San Diego township, San Diego county, California, which is on file in the papers, containing substantially the same statements sworn to before Justice Anderson. The complaint, warrant of arrest and affidavit of Ruby Bryant are all in proper form and duly authenticated by the justices of the peace, the county clerk and the governor of California, the latter certifying that the charge is properly made under the laws of California, and the official character of the justices of the peace is also duly certified.

As to the second objection, the affidavit of the sheriff shows that he received the warrant of arrest on the 25th day of April, 1905, and that he thereupon endeavored to locate the defendant in the city of Los Angeles and other parts of the state, without success; also communicated with the authorities in Kansas City, Missouri, but did not learn of the whereabouts of Shumway until May 23, 1905.

The application for the requisition to the governor of California by the district attorney of San Diego county was made on the next day, namely, the 24th day of May, 1905.

This certainly was no delay. I do not consider the objections well taken.

By the Constitution of the United States:

"A person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime."

Const. U. S., article IV, section 2.

The statute of the United States enacted by Congress, section 5278, Revised Statutes, is as follows:

"Whenever the executive authority of any state or territory demands any person as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found, or affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled, to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority, appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear."

It is also provided by the statutes of Colorado as follows:

"Whenever the executive of any other state, or of any territory of the United States, shall demand of the executive of this State any person as a fugitive from justice, and shall have complied with the requisitions of the act of Congress in that case made and provided, it shall be the duty of the executive of this State to issue his warrant under the seal of the State to apprehend the said fugitive, directed to any sheriff, coroner or constable of any county of the State, or other person whom the said executive may think fit to intrust with the execution of said process.* * *"

1 M. A. S., section 2037.

Even if it be true that the complaint and warrant signed by Justice Anderson are not valid, there is on file an affidavit made before Justice Thorp, making the same charge, and in proper form, and duly certified by the governor of the state of California, which seems to me clearly to bring the case within the provisions of the act of Congress referred to, which authorizes the production of an affidavit made before a magistrate, charging the person with having committed treason, felony, or other crime, and certified as authentic by the governor of the state fled from, and which makes it the duty of the executive authority of the state to which he has fled, to cause him to be arrested and delivered to the agent of the executive authority making the demand.

I am of the opinion that the papers substantially comply with the rules of practice in such cases made and provided, and that they are sufficient to authorize you to honor the requisition.

Respectfully yours,

N. C. MILLER,
Attorney General.

By W. R. RAMSEY,
Assistant Attorney General.

GAME AND FISH DEPARTMENT.

Game and fish importers must take out license for the entire year.

February 27, 1906.

HON. J. M. WOODARD,
Game and Fish Commissioner,
State Capitol.

Dear Sir—I am in receipt of your favor of this date, asking for an opinion as to whether game and fish importers can take out a license for a part of a year only, and in reply I beg to advise you that section 4, division D, of the game law provides that:

"No person shall import or bring into this State from any other state or territory, and sell, any game or fish of the kind mentioned in this act, until he shall have procured from the commissioner a license as a game and fish importer, but no such license shall authorize the importation or sale of game, the killing of which is not permitted by the laws of this State.

"Such license shall be kept constantly and publicly exposed in the office or place of business of the licensee, and shall expire with the calendar year in which issued."

And section 2, of division M, of the same law provides that the importers' license fee shall be fifty dollars.

I find no provision in the game law for allowing a license to be issued for less than fifty dollars, and such a license expires with the calendar year.

I am of the opinion that the Legislature did not intend that any license should be issued for a part of a year only.

Respectfully submitted,
N. C. MILLER,
Attorney General.

By I. B. MELVILLE,
Assistant Attorney General.

GAME AND FISH DEPARTMENT.

Court has no right to remit or reduce fines collected for violations of game laws.

April 28, 1906.

HON. J. M. WOODARD,
Game and Fish Commissioner,
State Capitol.

Dear Sir—In reply to your written inquiry of the 27th inst., as to whether or not a court has the right to remit any portion of the minimum fine assessed for a violation of the game law, I beg to advise you as follows:

Section 4, division L, reads:

"Every person or officer violating any of the provisions of this act, otherwise than as contemplated in section 3 of this division, shall be guilty of a misdemeanor and be punished by a fine of not less than $25 nor more than $500, or by imprisonment in the county jail not less than 10 days nor more than six months, or by both such fine and imprisonment."

Section 10, division L, reads:

"All moneys collected for fines under this act shall be immediately paid over by the justice or clerk collecting the same, as follows: One-third into the treasury of the county where the offense was committed, one-third to the commissioner and one-third to the person instituting the prosecution. Provided, That if the person instituting the prosecution shall fail for ten days after such collection and due notice thereof to demand the portion to which he is entitled, the same shall be paid to the commissioner and the right of such person thereunder shall be deemed forfeited.

"The commissioner, any warden or officer instituting a prosecution shall be entitled to a share in the fines collected, the same as any other person, and it shall be a personal perquisite, for which he need not account."

Section 4, division K, reads:

"No fine, penalty or judgment assessed or rendered under this act, or the act of which it is amendatory, shall be suspended, reduced or remitted otherwise than as expressly provided by law."

Since there is no provision in the game laws granting authority to a court to reduce or remit any portion of the fine, I am of the opinion that no such authority exists, and that each court

within which a conviction has been had can not legally remit any portion of the fine imposed.

Respectfully submitted,
N. C. MILLER,
Attorney General.
By I. B. MELVILLE,
Assistant Attorney General.

GAME AND FISH DEPARTMENT.

Actions under game and fish law must be brought within six years. Section 2900, 2 M. A. S.

April 28, 1906.

HON. J. M. WOODARD,
Game and Fish Commissioner,
State Capitol.

Dear Sir—In reply to your inquiry as to the length of time within which a civil action must be brought under the game laws for the recovery of possession of game illegally taken or held, or for the value of such game, I am of the opinion that such actions should be construed as being governed by the sixth clause of 2 M. A. S., 2900, which reads:

"The following actions shall be commenced within six years after the cause of action shall accrue and not afterwards. * * * *Sixth*—All actions of replevin and all other actions for taking, detaining or injuring goods or chattels."

Respectfully submitted,
N. C. MILLER,
Attorney General.

By I. B. MELVILLE,
Assistant Attorney General.

GAME AND FISH DEPARTMENT.

Game and Fish Commissioner has no authority to issue a lake license for waters not on lands helds by private ownership, or held under the laws relating to reservoirs or irrigation.

May 4, 1906.

HON. J. M. WOODARD,
State Game and Fish Commissioner,
Denver, Colorado.

Dear Sir—In reply to your request for an opinion from this office, as to whether or not you have the authority to issue a lake license to private persons not the owners or lessees of the land upon which the lakes are situated, I beg to advise you that division C of the game laws provides for the licensing of public and private parks, lakes and preserves and designates which of these shall be public and which private, and sections 4 and 23 of said division state that such a license shall only include the waters upon lands held by private ownership or under the laws relating to reservoirs or irrigation.

In accordance with the plain provisions of this law, therefore, you can only issue licenses for waters upon lands held by private ownership, or under the laws relating to reservoirs or irrigation.

Respectfully submitted,
N. C. MILLER,
Attorney General.

By I. B. MELVILLE,
Assistant Attorney General.

GAME AND FISH.

Game and Fish Commissioner can not abandon site for hatchery and select site for a new hatchery unless authorized by the Legislature.

May 16, 1906.

HON. A. E. BENT,
Auditor of State,
Denver, Colorado.

Dear Sir—I have your letter of May 14th, enclosing a communication received by you from the Game and Fish Commis-

sioner, relative to the right to use $1,191.91, now standing to the credit of the maintenance fund of the Routt County Hatchery for the biennial period of 1905 and 1906, for the purpose of moving such hatchery from its present location to a point within the town of Steamboat Springs.

The communication from the Game and Fish Commissioner shows the desirability and advantage of the proposed change. It therefore is to be regretted that it is not within the power of the Game and Fish Commissioner to do as he thinks for the best interests of the State.

"That there is hereby appropriated, out of any money in the State treasury not otherwise appropriated, the sum of twenty-five hundred dollars for the purpose of purchasing a site for a branch State fish hatchery in the county of Routt, to be selected by the State Fish Commissioner, or by the officer who shall discharge the duties heretofore discharged by the State Fish Commissioner, and for the erection and stocking of said hatchery."

3 Mills (Revised), section 1963u.

"The said Fish Commissioner shall, within sixty days after this act shall take effect, select a site for said hatchery at Steamboat Springs, Routt county, Colorado."

3 Mills (Revised), section 1963v.

The latter section provides that the Fish Commissioner shall, within sixty days after the act takes effect, select a site, and after he has selected a site it becomes the property of the State, and the sum of money placed at his disposal for this purpose is expended, the trust is executed and the official power of this officer in that regard is discharged and terminated. He has not the power later to select a new site and expend an additional sum of money unauthorized by the Legislature for the purchase of a new site.

It will require an act of the Legislature to authorize the Game and Fish Commissioner to abandon the old site, when once selected, and to purchase land again for the benefit of the State and expend its money therefor.

None of the boards or officers of the State of Colorado have the right to purchase land unless authorized by the State, and then they may only do so in the particular manner pointed out by the statute authorizing them; and when the duty is once discharged the power is at an end.

Yours truly,

N. C. MILLER,
Attorney General.

GAME AND FISH.

One-fourth of each license fee collected by the county clerk can be retained by him.

January 19, 1905.

HON. J. M. WOODARD,
State Game and Fish Commissioner,
State Capitol, Denver.

Dear Sir—In reply to your request for an interpretation of section 6, division G, of the game laws, I beg to advise you that the wording of this section provided that a fee of one dollar shall be charged for issuing a license by the county clerk, one-fourth of which shall be paid by him into the general fund of the county, one-half to you as Commissioner, and one-fourth shall be retained by him as his compensation "for filing the application, issuing the license, keeping a record thereof, making a report as hereinafter provided, and all other services connected therewith."

You say that certain counties claim not only the fee allowed to them by this statute, but also contend that the county clerk must turn the fee apportioned to him into the county fund, the same as other fees of his office.

While it is true that the county clerk is a county officer, whose salary and fees are regulated by law for his services, rendered in that behalf, this section imposes other and different duties upon him, entirely foreign to those of his regular duties as county clerk, and for such services one-fourth of said fee is allowed him.

That this was the intention of the Legislature in passing this law, is not only shown by the wording itself, above quoted, but it is further shown by the balance of the section which provides that "one-fourth shall be by him paid into the general fund of his county, thus providing for the distribution of the entire fee of one dollar, and one-half paid over by him to the Commissioner," by allowing one-fourth to the clerk, one-fourth to the county and one-half to the Commissioner. Whereas, if the contention should prevail that he must turn the one-fourth allowed to himself into the county fund, the county would be receiving one-half of such fee, which would be contrary to the express provision of this section.

I am, therefore, of the opinion that one-fourth of each license issued by said county clerk should be retained by him,

over and above his regular salary received as county clerk and recorder of his county.

Yours truly,
N. C. MILLER,
Attorney General.

By I. B. MELVILLE,
Assistant Attorney General.

GIFT ENTERPRISE.

The Legislature can not make something a gift enterprise which is not fairly within the meaning of that expression. The Legislature can not deprive a person of the right to handle his property as he sees fit and to conduct his business in any enterprising manner he may devise, unless in doing so he violates the liberty and rights of others.

April 14, 1905.

HON. JESSE F. McDONALD,
Governor of Colorado,
State Capitol.

Dear Sir—In compliance with your request, I return herewith Senate Bill No. 202, with my opinion thereon, as follows:

The gist of this bill is as follows:

Section 1. It shall be unlawful for any person, etc., to engage in or patronize any gift enterprise of any nature, or to sell, give, receive or exchange gift enterprise tickets or stamps.

Sec. 2. The term "gift enterprise" is defined to include the selling or giving by any person to another person, in consideration of the purchase of any goods, any ticket or stamp which entitles the recipient to demand or receive any goods undetermined or unknown to the purchaser at the time of the receipt of the ticket or stamp.

Sec. 3. The term "gift enterprise" shall include the receipt or acceptance by a purchaser of goods of any ticket or stamp which entitles such purchaser to demand or receive or exchange any article of goods, undetermined and unknown at the time of the receipt of the ticket or stamp.

Sec. 4. The term "gift enterprise" shall include the exchange of any article or goods for any ticket or stamp in consideration of the purchase of goods, wares or merchandise to be so exchanged, it being indefinite and unknown to the purchaser at the time of the receipt of the stamp.

Section 5 relates to the penalty, and in this connection the act does not confer jurisdiction upon police judges or justices of the peace.

The Legislature has undertaken by this act to define certain transactions as coming within the meaning of the legal phrase "gift enterprise," as used in section 2, article XVIII, of our Constitution.

The Legislature can not make something a gift enterprise which is not fairly within the meaning of that expression. In other words—to illustrate my point—the Legislature can not declare any transaction larceny which it sees fit to designate as such. Our Legislature has, in very many statutes, defined certain transactions as larceny, but they all have one important characteristic, viz., the deprivation of the owner of the immediate possession of his property and its conversion to the use or enjoyment of the appropriator. I do not know that the Legislature has declared any transaction to be larceny which lacks the essential element I speak of. The effacing of the brand upon cattle is designed to deprive the owner of possession and title. A bailee who receives money to be dealt with in a certain manner, and who converts it to his own use, is also guilty of larceny under our statute. So, if the Legislature undertakes to set out certain transactions as sufficient to amount to a gift enterprise, they must partake of some essential ingredient of a gift enterprise. The Legislature has no right to give to a transaction a different color from that which it possesses.

When the Constitution authorized the Legislature to pass a law prohibiting gift enterprises, it was presumed that the expression meant something definite, and that any law passed must fall within the meaning of that expression.

Every person is entitled, under our State and Federal Constitutions, to conduct his business in any manner he chooses. The exception to this rule is the power of the State to pass laws to promote and perfect the health, morality and safety of the public, and legislation within these limitations is sustained as the exercise of police power.

The Legislature, therefore, can not violate the right of any person to handle his property as he sees fit and to conduct his business in any enterprising manner he may devise.

The enjoyment and pursuit of his business, occupation, profession or trade are all protected by these constitutional guarantees. The right of the Legislature to interfere is only in case he adopts methods of business injurious to the public safety, health and morals.

These constitutional guarantees are of the utmost value to our citizens and should not be lightly infringed upon, simply to protect some person who feels that he is injured in business. Damage to business is not a standard with which to reckon the constitutionality of legislative interference with one's conduct

of business or enjoyment of property. Almost everyone can point out numerous ways in which he is damaged in his business by practices that are permitted by the State, yet he would not be allowed to call upon the Legislature for redress.

I presume the individual feels more keenly to-day than ever before in the history of the world the harm growing out of large combinations. Department stores are injuring the success of individual enterprise, and the person who undertakes to conduct a business in any one line of trade repeatedly experiences great losses from the cutting of prices in the particular department of these great stores, where the line of goods is the same, yet I know of no principle of our Constitution which would allow a Legislature to prescribe how large any store should be or how many departments it shall contain.

We are therefore brought face to face with the consideration of this law as worded, to determine whether the transactions defined in the various sections constitute a gift enterprise.

What is the essential ingredient of a gift enterprise? The word is used in our Constitution in connection with lotteries. It was undoubtedly intended to cover some transaction which the word "lottery" might fail to do. It was associated with "lottery" to strengthen and enlarge its meaning, and therefore we are furnished a clue to the meaning of the phrase. Gifts are certainly not unlawful, and gift enterprises are not inherently unlawful. The fact that one gets something for nothing is not unlawful. Nor is it within the constitutional power of the Legislature to declare or make a gift unlawful.

The element of chance is not sufficient to render a transaction a gift enterprise. The chance must be of some harmful nature to the public, such as gambling or a lottery.

The person who buys a sewing machine on monthly instalments may never acquire title to the machine because of failure to make the final payment, and yet the transaction is a legitimate one. A person who pays monthly instalments to a diamond merchant upon the condition that when the final payment is made the jewel will be delivered, also takes a chance, but it is fair and legitimate. And so, also, all the transactions of life are subject to chance. The question is whether the chance is of such a nature as to be injurious to public morals. Otherwise a person has a right to conduct his business, adopt such devices and plans and shape up his enterprises in any manner he chooses, subject to the right of the State to regulate for the promotion of the safety, health and morals of the public.

I have examined this bill with reference to these exceptions, and it appears to me that it is not the subject of anything which warrants the interference of the State for the purpose of promoting the health, morals or safety of the people.

The several sections, compressed in plain language, are set out in the opening of this opinion. The first section provides

that the giving of a trading stamp to the purchaser of an article, which entitles the recipient to receive another article undetermined and unknown at the time of the receipt, is a gift enterprise. In my judgment this provision is a clear invasion of the constitutional right of a person to give anything he pleases to another, and all the elaboration of words contained in the section does not change the essential spirit of the section.

Section 3 provides that the receipt of a trading stamp by a purchaser of goods, entitling him to receive some article in exchange, unknown at the time of the receipt, is within the meaning of the term "gift enterprise."

Here we have probably the element of uncertainty as the ingredient relied upon as making the transaction immoral. The transaction is in the nature of an advertising scheme. The purchaser pays the full price for the goods and he receives a stamp in return, which entitles him to something upon condition. I see nothing immoral in the condition. The uncertainty of the transaction does not make it immoral, and, even if the gift embraces the element of uncertainty, I do not see how the donor has violated the personal rights of any one. The essential point to be kept in mind is that the people have a right to do with their property what they choose.

They may give it away in reality, or give it away upon condition, and if there is nothing immoral in the transaction, the Legislature has no right to interfere with it. It is a fair and legitimate enterprise.

Section 4 affords nothing essentially different from what has already been pointed out.

I have read all the decisions that have been submitted in connection with this bill, and the overwhelming weight of authority is clearly against its constitutionality. The Supreme Court of the United States has said:

"If a statute purporting to have been enacted to protect public health, the public morals or the public safety, has no real or substantial relation to those objects, it is a palpable invasion of the rights secured by fundamental law, and it is the duty of the courts to so adjudge and thereby give effect to the Constitution."

Yick Wo vs. Hopkins, 118 U. S., 356.

The motive prompting this legislation is not to correct some moral evil, or to promote the public health or safety, but the bill is aimed as a blow at a device employed by certain merchants to stimulate trade, and the inspiration of the bill is to suppress the use of trading stamps, because, as a matter of fact, it does promote the sales in certain stores, to the disadvantage of other stores. It is, therefore, clearly and confessedly not an exercise of the police power of the State. If there is a monopoly in this device employed by certain stores to the injury of others, the

bill is not founded upon that principle. It defines the use of trading stamps to be of the nature of a gift enterprise, and if this definition is not true, the statute is invalid. It may be that the trading stamp device demoralizes trade, and it may be that persons in moderate circumstances are stimulated in this way to invest beyond moderation. If every plan adopted by merchants calculated to stimulate trade is to be condemned because it is demoralizing, then surely the Legislature will have a large field of work to undertake.

The use of "leaders," the exposition of showy goods in the windows, "special sales," all tend to make persons buy things that they do not then actually need, but which they are told they will want in the future and they had better lay in while the prices are low. The effect of this method of trading is always to buy something that persons of moderate circumstances could get along without. In the end, there is nothing saved to the poor person. His money is usually spent because there are great bargain days. A person who goes to an auction gets in with a multitude of persons who are bidding and buying, not because they actually need the goods, but because they are tempted to bid, and, under excitement, buy and pay more than the article could be bought for in the regular market.

So that, in any light in which this transaction may be viewed, I am unable to discover anything in it in the nature of an evil. I only find in it an advantage which one merchant has over another. This may be a monopoly, and might be condemned on that ground. But that is not the theory upon which this legislation is enacted, because it is declared to be a gift enterprise, and it must stand or fall according to the truth or falsity of that definition.

I quote the following citation contained in the opinion of Judge Lindsey in the case of the City and County of Denver against H. D. Frueauff:

"As stated by the Supreme Court of the United States: 'To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference, and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The Legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts. Here reference is made to Henderson vs. Mayor, 92 U. S., 259; Chy Lung vs. Freeman, 92 U. S., 275; R. R. Co. vs. Huson, 95 U. S., 465; Rockwell vs. Nearing, 35 N. Y., 302; Austin vs. Murray, 16 Pick., 121; Watertown vs. Mayo, 109 Mass., 315; The

Slaughter House cases, 16 Wall., 36; In re Cheeseborough, 78 N. Y., 233; Brown vs. Perkins, 12 Gray, 89; Lawton vs. Steele, 152 U. S., 133.'"

Judge Lindsey also says:

"In support of the ordinance it is contended that the trading stamp device is a lottery, and therefore immoral. But we can not see that it has any resemblance to a lottery. There is in it no element of chance and nothing in the nature of gambling. It appears to be simply a device to attract customers, or to induce those who have bought once to buy again, and *in this respect is as innocent as any form of advertising.*"

Ex Parte McKenna, 126 Cal., 429.

Young vs. Commonwealth, 45 S. E. R. (Va.), 327.

"It is simply one of the infinite variety of devices which are resorted to by trades-people in these days of sharp competition to promote the sale of their goods. Pl. of New York vs. Dycker, 72 App. Div., 308; State vs. Dalton, 48 L. R. A., 775 (R. I., 1900); State vs. Shugart, 35 So. R., 28 (Ala., 1903).

"It does not differ from the ordinary business, except in the method of advertising and in lawful trade inducements. It is true that this method of doing business may enable a trader to do more business than he otherwise would, and more than his competitor across the street, who does not choose to incur the expense *incident to this method of advertising* and increasing his business, but this furnishes no reason for prohibiting the business. State vs. Dodge, 76 Vt.; Flaherty vs. State, Nebraska, 1903."

The case of State vs. Hawkins, 95 Maryland, 133, sustains the constitutionality of this act, but the case is not in harmony with the large number of decisions which declare that the essential provisions of this law are contrary to the rights of private persons to conduct their own business.

I presume it would be well to sign the bill and allow the courts to determine if the law is constitutional. I believe it is the province of the courts to decide these matters, unless it could be shown that great damage would result from the Governor's approval of the bill, which is clearly unconstitutional

It is claimed in this case that the users of the green trading stamps will be harassed and oppressed with litigation for the purpose of stopping the use of the stamps, and that it would be impossible to obtain a decision upon the law without great interference with the liberty and the rights of the patrons.

My judgment is that a criminal case will have to be commenced in either the County or the District Court, and that the judgment of either court will be far more satisfactory to the public than an opinion from this office. I would much prefer

to see the bill signed and allowed to be decided in either of these tribunals.

I have not undertaken to cite the decisions against the law, because they are very numerous and of no particular value in this opinion. However, I quote from Hewin vs. City of Atlanta, 49 S. E., 765, the following:

"The legality of the trading stamp business has been the subject of numerous decisions. It has been held in a number of cases that there is nothing in the business which subjects it to the control of the state or its subordinate public corporations under the police power. While the question has never been before this court, rulings in other states seem with practical, even if not entire unanimity, to concur in the conclusion, not only that the business is legitimate, but that the right to engage in it without due interference from states and municipalities is guaranteed by the Constitution of the United States, to the same extent, and subject only to the same restriction that can be placed around a person engaged in any lawful business not within the range of the police power. Among the numerous cases that might be cited on this question, we call attention to the following: City of Winston vs. Beeson (N. C.), 47 S. E., 457; State vs. Dodge (Vt.), 56 Atl., 983; State vs. Ramseyer (N. H.), 58 Atl., 983; State vs. Shugart (Ala.), 35 So., 28; Long vs. State (Md.), 12 L. R. A., 425; Comm. vs. Sisson (Mass.), 60 N. E., 385; People vs. Gillson (N. Y.), 17 N. E., 343; Young vs. Com. (Va.), 45 S. E., 327. See, also, Central Law Journal, 421."

I would also call attention to the editorial in the Central Law Journal, under date of March 17, 1905, upon this decision.

Respectfully submitted,

N. C. MILLER,
Attorney General.

INHERITANCE TAX LAW—FEES AND EXPENSES OF APPRAISER.

An appraiser is entitled to be paid out of the inheritance tax the sum of $3.00 per diem for each day actually and necessarily employed, together with his actual and necessary traveling expenses, and no more. No provision is made for a stenographer.

May 8, 1906.

HON. R. H. MALONE,
Denver, Colorado.

Dear Sir—In compliance with your request for an opinion as to the fees and expenses allowed by law to an appraiser in inheritance tax cases, I beg to say:

Our statute provides that said appraiser shall be paid "on the certificate of the county judge at the rate of three dollars per day, for each day actually and necessarily employed in said appraisement, together with his actual and necessary traveling expenses, and the witnesses subpoenaed by said appraiser shall be paid such fees as now provided by law."

See section 31, Session Laws 1902, page 55.

As to such fees and expenses, our statute is similar to the statute of Wisconsin. In fact, the language is almost identical. The Wisconsin statute provides:

"Every appraiser shall be paid on the certificate of the county judge at the rate of three dollars per day for every day actually and necessarily employed in such appraisement and his actual and necessary traveling expenses and the fees paid such witnesses, which fees shall be the same as those now paid to witnesses subpoenaed to attend in courts of record. * * *."

The Wisconsin statute has been construed by the attorney general of that state. Referring to that statute, the attorney general said:

"If appraisers are appointed under the provisions of section 14, each appraiser is to be paid on the certificate of the County Court at the rate of three dollars per day for each day necessarily employed in such appraisal and his actual and necessary traveling expenses and fees paid witnesses, which fees shall be the same as those now paid witnesses subpoenaed to attend in courts of record. * * * There is no provision in the act giving any other fees to the appraiser, and since no such provision exists, it follows that none other can be paid. If an appraiser appoints a stenographer who takes the testimony there appears to be no provision of law by which the stenographer can be paid out of the tax due the state. There is no provision in the act giving the county judge, where he appraises the property, any compensation or fees. If there are any expenses incurred by the county judge for a stenographer in taking the testimony, my opinion is that such expense should be paid out of the estate in the same manner that other expenses of administration are paid."

It will be observed that our statute makes no provision for the compensation of the appraiser other than the three dollars per diem for each day actually and necessarily employed in said appraisement, together with his actual and necessary traveling expenses, and I am of the opinion that no other expenses except those mentioned can be legally paid out of the inheritance tax.

According to my construction of the words "actual and necessary traveling expenses," I think it was the purpose of the

Legislature to provide for the actual traveling expenses incurred by said appraiser in the performance of his duties as such appraiser; but it must also appear that such expenses were necessary.

I find no provision in the statute authorizing the employment of a stenographer to take down evidence heard by the appraiser, and for the payment of his fees. If such expenses are incurred by the appraiser and are allowed by the court, I think they must be paid out of the estate as other expenses of administration, and not out of the inheritance tax due the State.

Respectfully yours,

N. C. MILLER,
Attorney General.

By W. R. RAMSEY,
Assistant Attorney General.

INSANE ASYLUM.

Authority of Governor to remove Secretary of State Board of Lunacy Commissioners.

The law requiring signature of the secretary will not prevent the new appointee from investigating same and signing it.

How special meetings may be called.

January 18, 1906.

DR. C. F. ANDREW,
President, State Board of Lunacy Commissioners,
Longmont, Colorado.

Dear Sir—I understand that you have submitted the following questions for a legal opinion from this office:

1. May the State Board of Lunacy Commissioners call a special meeting?

2. If so, in what manner may such meeting be called in order to transact business lawfully?

3. When does the compensation of Mr. E. G. Middelkamp, as secretary, terminate?

These questions arise out of the removal of Mr. Middelkamp, by the Governor, on the 5th day of January, after a hearing. Upon his removal, the Governor appointed Mr. M. Studzinski.

It is now desired to call a special meeting of the Board for the purpose of electing a secretary. So far as the constituency of the Board is concerned, the title to office is evidenced by the com-

mission issued by the Governor and the taking of the proper oath of office. If Mr. Studzinski, the new appointee, is properly qualified, he is a member, regardless of the time when your special meeting is called. It will, therefore, only be necessary to elect a secretary in order to proceed with your business.

Section 3 of the Laws of 1899, at page 258, provides for the holding of quarterly meetings at the asylum for the transaction of business and affairs entrusted to the care of the commissioners, and directs that the meetings shall be held on the first Tuesday in the months of March, June, September and December of each year.

The next regular meeting of the Board will occur on the first Tuesday in March, 1906.

You state that there are a number of bills which the Board acted upon at its December meeting and allowed, but which require the signature of the secretary, and that Mr. Middelkamp refuses to sign them since his removal, on the advice of his attorney. This will not place any serious obstacle in the way of your official disposition of the bills.

In view of this state of affairs you should call a special meeting of the Board at the asylum, for the purpose of electing a new secretary and for the further purpose of authorizing him to sign these bills, and to provide for the payment of the same by the Board. It is always necessary, in calling a special meeting of the Board, to notify every member, and also to state clearly the objects of the meeting. I would therefore follow somewhat closely the language I have used above in specifying the purposes for which the special meeting is called.

At the request of Dr. Grant, I rendered an opinion, on July 9, 1903, as to the power of the commissioners to call a special meeting, and defining the procedure. The opinion is somewhat full, and a reference to the same, at page 54 of the Attorney General's Report for 1903-1904, is better than a reproduction of the opinion. Since writing that opinion, however, I have had occasion to read the opinion of our Supreme Court in the case of The People ex rel. Crawford vs. Lothrop, 3 Colo., 428, 452, which fully sustains the opinion rendered to Dr. Grant. I copy from this opinion, at page 457, as follows:

" 'Where a body or board of officers is constituted by law to perform a trust for the public or to execute a duty prescribed by law, it is not necessary that all should concur in the act done. The act of the majority is the act of the body, and where all have had due notice of the time and place of meeting, in the manner prescribed by law, or by the rules and regulations of the body itself, if there be any, otherwise, if reasonable notice be given, and no practice or unfair means are used to prevent all from attending and participating in the proceedings, it is no objection that all the members do not attend, if there be a quorum. In the

present case all three having had an *opportunity* to act, the act of two is sufficient.' In The Commonwealth ex rel. Hall vs. The Canal Commissioners, 9 Watts, 466, in which the question referred to the decision of the court was, whether the act of a board of appraisers (one of whose members had resigned) in making an appraisement of the damages done to the relator's land by reason of the construction of a canal was valid, the court, Chief Justice Gibson delivering the opinion, affirmed its validity. The court substantially says: 'These appraisers were constituted a board for the performance of duties of a *public, deliberative* and *judicial* nature, and it may be safely said that any duty of an aggregate organ of the government may be performed by a majority of its members where the constituting power has not expressly required a concurrence of the whole,' and further, 'that it is not to be supposed that the functions of the board would be suspended, to the detriment of the public, by the loss of one of its members.' And herein lies the important distinction between a mere private agency and a public aggregate agency charged with the duty of exercising a governmental function. If one of several persons to whom is confided the execution of a private trust refuses to join with the others, or if, after his appointment and before the execution of the trust, he dies, the business may be put off till another time. Not so with public business of a deliberative or judicial character. It can not be deferred to a more convenient season. By necessity, prompt action is required. The law exacts it. The public weal demands it. The framers of the Constitution and the people who adopted it, we think, did not intend by the manner in which the board was formed, to place it in the power of one member to prevent its sitting."

In reply to the third question, I would say that Mr. Middelkamp's salary terminates on the day of his removal, and this date is fixed by the order of the Governor, removing him.

Respectfully submitted,

N. C. MILLER,
Attorney General.

INSANE ASYLUM—APPOINTMENT.

The statute provides that the Assistant Superintendent of the State Insane Asylum shall be selected and appointed by the Superintendent, subject to the approval of the Board of Lunacy Commissioners.

June 27, 1905.

DR. W. W. GRANT,
President State Board of Lunacy Commissioners,
Denver, Colo.

Dear Sir—In reply to your letter dated June 26, 1905, requesting an opinion as to the appointment of an assistant superintendent of the State Insane Asylum, I would say that the law provides, first, for the appointment of a superintendent by the Board of Lunacy Commissioners. As to the assistant superintendent, the language of the statute is as follows:

"The commissioners may further provide for an assistant superintendent, who shall be a physician of at least five years' practice in his or her profession, and for such other assistants and employes as may be necessary, and they shall prescribe their duties and fix their respective compensations. All such assistants and employes shall be selected and appointed by the superintendent, subject to the approval of the commissioners, and they shall hold their positions subject to such rules and regulations as the commissioners may prescribe."

3 Mills (Rev.), page 809.

The law authorizes the commissioners to appoint a superintendent, but they are simply to provide for an assistant superintendent and such other assistants and employes as may be necessary. I am of the opinion that, under the provisions of the foregoing statute, the assistant superintendent must be selected and appointed by the superintendent, subject, however, to the approval of the commissioners.

Respectfully yours,
N. C. MILLER,
Attorney General.

By W. R. RAMSEY,
Assistant Attorney General.

INSURANCE.

If the person termed "Financial Director" acts as an agent or solicits business in this State for a foreign life assurance company, then the license fee of two dollars should be paid for each of such so-called "Financial Directors."

November 15, 1905.

HON. E. E. RITTENHOUSE,
Deputy Superintendent Insurance,
State Capitol.

Dear Sir—I am in receipt of your communication dated October 28, 1905, enclosing printed form of application and appointment used by the Central Life Assurance Society of the United States, of Des Moines, Iowa, in securing the services of "financial directors" for said company, and requesting an opinion as to whether or not such persons are subject to the payment of the agents' license fee.

In answer thereto, I have to say that the duties of a "financial director," as shown by the form of appointment used by the company, are as follows:

First—He shall co-operate with the company in making all collections of money due the company in the county.

Second—He shall use his influence in building up the business of the company in his county.

Third—He shall assist the officers of the company as he may be able in keeping a good agent at work in his county.

Fourth—He shall be engaged in a general banking business, thus furnishing the facilities for handling the business contemplated in this appointment.

Fifth—He shall make a full report of all funds in his possession upon the first of each month, and forward by draft all amounts due the company.

Sixth—He shall co-operate with the officers in securing choice loans at as good a rate of interest as possible, should the company desire to loan funds in his county.

Seventh—He shall report to the company any conduct upon the part of the agents or medical examiners that is detrimental to the best interests of the company."

It is further provided that for his services as such financial director he shall receive five per cent. out of the first annual premium upon all accepted and paid for business produced in his county during the term of said contract, and three per cent. of the second annual premium, also one per cent. of all renewal pre-

miums thereafter in said county, whether collected by the party of the second part or paid direct to the company; and also that said contract shall continue for a period of twelve years from the date thereof.

It is also provided that in every county organized by the company there shall be appointed a "financial director," and that no appointment shall be made in the county except from among the policy holders of the company, giving preference to persons holding policies of not less than five thousand dollars on any plan other than term insurance on which the full first year's premium has been paid in cash to the company.

Section 2212, M. A. S., volume 1, page 1332, provides that every insurance company doing business in this State shall pay to the Superintendent of Insurance the following fees, viz.: For certificate of authority to transact business in this State, five dollars; for each copy of certificate of authority for use of agents, two dollars.

Section 2216, 1 M. A. S., page 1333, provides:

"It shall be unlawful for any person, company or corporation of this State, either to procure, receive or forward applications for insurance in, or to issue or to deliver policies for any company or companies not having complied with the provisions of this act, or to adjust any loss, or in any manner, either directly or indirectly, to aid in the transaction of the business of insurance with any such company unless duly authorized by such company, and licensed by the Superintendent of Insurance in conformity to the provisions of this act."

Section 2217, 1 M. A. S., page 1333, provides:

"No company shall transact, in this State, any insurance business unless it shall procure from the Superintendent of Insurance a certificate stating that the requirements of the laws of this State have been complied with, and authorizing it to do business. * * * Every such company shall be required to procure annually, for the use of its *agents and solicitors*, copies of such certificate of authority, and any person *soliciting business for any company* authorized to transact business in this State, without first procuring a certificate of the Superintendent of Insurance, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of one hundred dollars for each and every offense."

According to the foregoing provisions, if the person termed "financial director" acts as an agent or solicits business in this State for such company, then I think the license fee of two dollars should be paid for each of such directors.

It will be observed that section 2217 attaches a penalty to any person soliciting business for any company authorized to transact business in this State without first procuring a certificate from the Superintendent of Insurance.

The duties prescribed by this company for its so-called "financial director" are certainly very broad and comprehensive—sufficiently so to include the right to solicit business, and such director has more authority than a regularly appointed insurance agent.

In my opinion the payment of said fees should be required. To hold otherwise would be to permit an evasion of the law under delusive names.

Respectfully submitted,

N. C. MILLER,
Attorney General.

INSURANCE.

A foreign fire insurance company doing business in this State should not be permitted to engage also in the business of accident insurance.

December 30, 1905.

HON. E. E. RITTENHOUSE,
Deputy Superintendent Insurance,
State Capitol, Denver.

Dear Sir—In answer to your letter inquiring whether a foreign fire insurance company doing business in this State can also engage in the business of accident insurance, I beg to say that our law relating to the organization of domestic companies provides for fire, life or accident insurance, and prohibits any company so organized from issuing policies for more than one of said purposes, and also provides that no company that shall have been organized for one of said purposes shall issue policies of insurance for any other. See section 2224, volume 1, M. A. S., pages 1336-1337.

Referring to foreign corporations, our statute provides as follows:

"And such corporations shall be subjected to all the liabilities, restrictions and duties which are or may be imposed on such corporations of like character organized under the general laws of this State, and shall have no other or greater powers."

Section 499, 3 Mills (Rev.), page 244.

I am therefore of the opinion that the company represented by Mr. Bishop should not be permitted to engage in the business of both fire and accident insurance in this State.

Yours respectfully,
N. C. MILLER,
Attorney General.

By W. R. RAMSEY,
Assistant Attorney General.

INSURANCE.

The difference between a mutual fire insurance company and a stock insurance company is too radical to admit of a change from one to the other by amending the articles of incorporation.

The prohibition against an insurance company organized under the laws of this State adopting the name of any existing company or association transacting the same business, or a name so similar as to be calculated to mislead, applies only to domestic corporations.

January 8, 1906.

HON. A. E. BENT,
Auditor of State,
State Capitol.

Dear Sir—I return herewith the application of The National Mutual Fire Insurance Company of the state of Nebraska, with the recommendation that the compilation of papers transmitted herewith be filed and preserved in your office.

I call your attention to the amended articles on pages 8 and 9; also, to the original articles on page 6. Under the original articles, this corporation is "The Trans-Mississippi Mutual Fire Insurance Association of Omaha," and is clearly designated as a mutual company and required to do business on the mutual plan, as provided under chapter 43 of the compiled statutes of the state of Nebraska.

The original paper is entitled "Notice of Incorporation," but under the laws of Nebraska it constitutes the articles of incorporation. The amended articles on pages 8 and 9 seem to be a complete revision of the original articles.

However, the word "Mutual" appears in the title and it would seem impossible to file amended articles which would change the plan of the insurance company from mutual to stock. I do not consider that such a change could be made by

way of an amendment. I would therefore recommend that in issuing the license you clearly designate that it is authorized to do business only on the mutual plan.

Some point was raised as to the identity of the name, to-wit, "The National Mutual Fire Insurance Company," with the name of a company organized under the laws of Colorado.

"No insurance company organizing under the laws of this State shall adopt the name of any existing company or association transacting a similar business, or any name so similar as to be calculated to mislead the public."

Section 2215, M. A. S.

In reference to this objection, I will state that the prohibition relates to the organization of companies under the laws of Colorado, and prohibits two companies being organized under the same name. While our State, like one or two others, might adopt a statute prohibiting the admission of foreign corporations having names identical with companies organized within our State and doing business here, nevertheless, it has not such a statute.

Our General Corporation Laws has a similar statute in regard to corporations generally. The principle in the latter statute is identical with the one embodied in the statute concerning insurance companies.

In reference to the statute pertaining to corporations generally, Attorney General Campbell rendered an opinion, which will be found at page 179 of the Biennial Report, 1899-1900. The opinion was written by Hon. Calvin Reed, Assistant Attorney General. I quote from it as follows:

"The evident purpose of the above statute was to prevent confusion in the records of your office and to guard against mistakes on the part of the public consequent upon the existence of two or more corporations in this State bearing the same name.

"You will observe that the above statute deals only with domestic corporations and not with foreign corporations. The latter, before they are authorized or permitted to do any business in this State, are required to make certain filings in your office.

3 Mills (Rev.), section 499.

I M. A. S., sections 500 and 501.

Section 10, article XV, Constitution.

"It is immaterial, therefore, that two or more foreign corporations seeking to make filings in your office should bear the same name, or the same name as that of some domestic corporation, whose certificate of incorporation may have been previously filed in your office."

A statute similar to our own was passed on by the Supreme Court of Illinois. The law of that state reads as follows:

"And the auditor of public accounts (the superintendent of insurance) shall have the right to reject any name or title of any company applied for, when he shall deem the name too similar to one already appropriated, or likely to mislead the public in any respect."

1 Starr & C. Anno. Stat., 1st Ed., page 1311.

The court, in passing upon this statute, said:

"In no provision or requirement of the statute relating to the subject of admitting foreign companies to do business in this state is there anything said or implied as to the name of the applicant. It might be said that section 4 indicates the policy in this state to be that no two corporations doing an insurance business in the state shall have the same or similar names or names which are likely to mislead the public in any respect; but, conceding that to be true, we are at a loss to perceive how it can be maintained that the superintendent of insurance has a discretionary power to enforce that policy, in the absence of legislative enactment authorizing him to do so. To hold that he may do so, as the statute now stands, would be no more nor less than judicial legislation."

People ex rel. Traders' Fire Ins. Co. vs. Van Cleave, 47 L. R. A., 795, 798.

I would recommend that, under your power as Superintendent of Insurance, you require the applicant to use some proper term to distinguish it from the company having the same name in Colorado, such as, "of Omaha," or "of Nebraska."

I return these papers with my approval, in accordance with the foregoing opinion.

Yours truly,

N. C. MILLER,
Attorney General.

INSURANCE COMPANIES—INSOLVENCY—RECEIVER.

The Attorney General is not authorized to make application to the courts for the appointment of a receiver in case of the insolvency of fire insurance companies. Section 2240, M. A. S., refers to life and accident companies.

October 5, 1905.

HON. E. E. RITTENHOUSE,
Deputy Superintendent of Insurance,
Denver, Colo.

Dear Sir—Your letter of October 3, relating to the condition of the Mountain Mutual Fire Insurance Company, of Denver, enclosing a report of an examination of said company made for your department by Thomas C. Mills and Morris Lehman, has been received.

You state that from said report you have reached the conclusion that said company is insolvent, and refer the matter to this office for such legal action as may be necessary and proper.

In reply I beg to say that as to the appointment of a receiver, mentioned by you, I find no authority for the Attorney General to make application for the appointment of a receiver in case of the insolvency of a fire insurance company. Section 2240, 1 M. A. S., provides:

"When the Superintendent of Insurance, on investigation, is satisfied that any corporation doing business in this State under this act, has exceeded its powers, failed to comply with any provision of the law, or is conducting business fraudulently, he shall report the facts to the Attorney General, who shall thereupon apply to the District Court for an injunction restraining said corporation from the further transaction of business; and the said court, upon hearing the matter, may issue such injunction or decree the removal of any officer and substitute a suitable person to serve in his stead until a successor is duly chosen, and may make such other orders and decrees as the interests of the corporation and the public may require."

It is provided by section 2242, 1 M. A. S., that the Superintendent of Insurance shall have power in person, or by deputy, to make an examination of the books, papers, etc., of certain companies, and "if it shall appear to him that its liabilities exceed its resources, and that it can not within a reasonable time, not more than three months from the date of the original default, pay its accrued indebtedness in full, he shall report the facts to the Attorney General, who shall, upon the report of the Superintendent of Insurance, apply to the District Court for an order

closing the business of the corporation and appointing a receiver or trustee for the distribution of its assets among creditors; Provided, That notice of such application and a copy thereof in writing shall be served upon the corporation at least ten days before the same shall be heard; and Provided, That upon hearing the matter the court shall have power to make any order which the interests of the corporation and the public may require."

But the foregoing provisions of the statute refer to life and casualty insurance companies, and not to fire insurance companies.

I am ready to co-operate with you in any legal manner in securing protection to the public, but I know of no way in which you can proceed in cases of this kind, except as you may be authorized by the laws governing your department.

Of course, persons pecuniarily interested and holding claims against the company may resort to the courts for protection.

Yours truly,

N. C. MILLER,
Attorney General.

By W. R. RAMSEY,
Assistant Attorney General.

IRRIGATION.

Irrigation companies diverting waters from one public stream into another should be required to construct and maintain at their own expense suitable self-registering measuring devices. Such devices should be under the control and direction of the State Engineer's department. The services of water commissioners and deputies looking after such devices should be paid for by the boards of county commissioners of the counties in such irrigation districts.

May 23, 1906.

HON. THOMAS W. JAYCOX,
State Engineer,
Capitol Building, Denver.

Dear Sir—I am in receipt of your request for an interpretation of the provisions of an act of the General Assembly of the State of Colorado, entitled "An Act to Provide for and to Regulate the Exchange of Water Between Reservoirs and Ditches and the Public Streams," approved April 9, 1897, with special reference to the question of the expense connected with

the construction, maintenance and operation of a self-registering measuring device, as provided for in said act.

I gather from your communication that the water is being diverted by certain irrigation companies from another public stream into the Cache la Poudre river, for the purpose of irrigating lands within the drainage basin of the latter; that the prior appropriators along the Cache la Poudre are complaining that more water is being taken from this stream than is being turned into it from the other stream; that such prior appropriators desire that self-registering measuring devices be placed at the points of "intake," and also at the points of "diversion;" that the expense connected with the construction and maintenance of such devices be borne by such companies; that you appoint suitable persons to take charge of such measuring devices for the purpose of making daily reports, to the end that a proper and equitable division of all the water then in the Cache la Poudre river may be made; and that the expense connected with the employment of such appointees shall also be met by such irrigation companies.

The portions of the above mentioned act, necessary to a determination of the points herein involved, provide that any company transferring water from one public stream to another shall be required to construct and maintain, under the direction of the State Engineer, measuring flumes, weirs and self-registering devices, at the point where it is finally diverted from the latter stream.

From this provision it is evident that the intention of the law-makers was to place the expense of constructing and maintaining such self-registering measuring devices upon the company so transferring water from one public stream to another, and this is made more evident by section 2 of a following act of the Legislature, page 194, Session Laws of 1901, which provides a means for the enforcement of the above provision of the act of 1897, i. e., that if any such company so diverting water from one public stream to another shall fail or neglect to construct suitable measuring flumes or weirs for the accurate determination of the amount of water taken into, carried through and diverted out of any public stream, then the State Engineer, or Superintendent of Irrigation, shall, upon five days' previous notice in writing duly served upon such company, refuse to allow it to divert any of such water from said stream until it shall cause to be erected or repaired such flumes or weirs.

As to the second proposition, that you should appoint suitable persons to take charge of these measuring devices and make daily reports and compel the irrigation companies to meet such expenses, I am of the opinion that the law gives you no such authority, and this is borne out by the additional fact that no means are provided, as in the preceding case, for the enforcement of such demand by your department.

Section 3 of the act of 1897, above referred to, provides that it shall be the duty of the water commissioner of the water district in which the water is used to keep a record of the amount of water so turned into his district from any other district, and section 3 of the act of 1901, *supra,* provides that the State Engineer, or Superintendent of Irrigation, shall rate the measuring flumes and weirs and supply the water commissioner of the district in which the same are located with a rating table which shall be used by him in measuring water flowing to and from such public stream.

Section 2466 of Mills' Annotated Statutes makes a similar provision to the one under discussion applicable to all owners of ditches, canals or reservoirs in irrigation districts where priorities exist, and it has never been the rule, so far as I am advised, to compel such owner to bear the expense of keeping a person, appointed by you, in charge of such measuring device.

It is very plain that these later acts require that such measuring devices shall be under the immediate control and direction of the water commissioner; that he shall make the same use of them as he does of other measuring flumes and weirs in his district; and that whenever the duties thus imposed upon him become too great, he shall appoint a deputy, or deputies, as in other cases, and the expense incident thereto shall be paid by the boards of county commissioners of the respective counties comprising such district.

It is claimed by the prior appropriators along this stream that they should not be burdened by the additional expense imposed on account of this water being brought from another watershed and distributed in connection with the water of the Cache la Poudre, for the reason that they are in no wise responsible for such action, it being the voluntary act of such companies for their respective benefits.

It appears to me that if there is any merit in this contention, it should be addressed to the Legislature, rather than to your department, for if such contention should be sustained then all the early appropriators from a stream before the supply became insufficient for all users—thus necessitating the services of a water commissioner to divide the same—would be in position to demand that they also should be exempt from the taxes necessary to meet the expenses incident to the employment of water commissioners, for the reason that such services became necessary only on account of such subsequent appropriators.

I am of the opinion, therefore, that the irrigation companies diverting water from one public stream into another, for the purpose of irrigating lands within the drainage basin of the latter stream, should be required to construct and maintain, at their own expense, suitable self-registering measuring devices at the points of "intake" and "diversion," and that such measur-

ing devices should be under the control and direction of your department and the respective water commissioners, the same as all other measuring devices in irrigation districts; but that the services of such water commissioners and their deputies—when necessary to employ deputies—should be paid by the boards of county commissioners of the respective counties comprising such irrigation districts.

Respectfully submitted,

N. C. MILLER,
Attorney General.

By I. B. MELVILLE,
Assistant Attorney General.

JURY IN DIVORCE CASES.

A jury of three persons is illegal in divorce cases.

May 18, 1906.

HON. H. A. WILDHACK,
Meeker, Colorado.

Dear Sir—I have your letter asking my opinion concerning the right of plaintiff to go to trial in the County Court with a jury of three persons, in the absence of the defendant who has been duly served with summons, the court having previous to trial appointed an attorney, under the statute, to represent the defendant.

First. In relation to the appointment of the attorney: This attorney is not the choice of the defendant and can not waive any of the personal rights of the defendant. The appointment of an attorney by the court is in obedience to a statute adopted by the State of Colorado to prevent frauds by the plaintiff and defendant. In divorce matters no attorney can possibly represent a defendant unless employed and retained by the defendant.

Second. Section 1093, M. A. S., authorizes a jury of not less than three nor more than twelve, as the parties demanding a jury trial may direct. The statutes of the State of Colorado concerning divorce require the cause to be tried by a jury. The Code of Colorado says that the jury in a civil cause shall be six. The Legislature is authorized by the Constitution to fix the number of jurors, but the verdict must be unanimous.

City of Denver vs. Hyatt, 28 Colo., 141.

The laws of 1891, section 9, page 252, provide for the selection of a jury in one manner in County Courts of counties of the second, third and fourth classes, and in a different manner in counties of the first class. This act has been held to be unconstitutional.

Board of County Commr's vs. First Nat'l Bank, 6 Colo. App., 423.

Pitkin Co. vs. Bank, 24 Colo., 124, 126.

This statute has been declared to be in violation of the provision of the Constitution requiring uniformity of practice in all courts. I see no difference in the principle involved in the statute allowing a jury of three in County Courts, but not authorizing a jury of three in District Courts. I believe the statute is unconstitutional in this particular. And this appears to have been the opinion of the members of the Fifteenth General Assembly, as they passed an act relating to decrees of divorce, curing and healing all verdicts heretofore rendered by a jury of less than six.

The divorce law requires plaintiff and defendant to try their cause before a jury. I am under some doubt as to whether plaintiff and defendant have the right of trial by a jury of less than six, where both are present.

I would not answer your letter in regard to a matter in court except that divorce matters partake largely of a public nature, and the injury apt to be done by an illegal trial is so great, that I feel, in view of the importance of the question asked and its public nature, that I would be justified in replying to your letter.

I presume, however, that in any case pending in court, the judge has a right to permit a brief to be filed *amicus curiæ*. This right is well established, where attorneys have an interest in the decision to be rendered and where it is likely to affect some matter in which they are concerned.

Hoping that this covers your inquiry, I am,

Yours very truly,

N. C. MILLER,
Attorney General.

LEASE—HOLDING OVER.

The State having leased certain premises for the period of one year, held over with the consent of the lessors, paying rent according to the terms of the original lease. *Held* that the State is responsible for the rent until the expiration of the second year.

August 31, 1905.

HON. BULKELEY WELLS,
Adjutant General, State of Colorado,
State Capitol.

Dear Sir—I have examined the lease made on the 18th day of January, A. D. 1904, by the State of Colorado with Messrs. Stubbs & Jakway, of the second floor of the Opera House Building, situated in Telluride, Colorado, and also certain correspondence relating thereto, submitted to this office for an opinion concerning the same.

It appears that the lease was made for a period of one year, namely, from the 18th day of January, A. D. 1904, until the 18th day of January, A. D. 1905. By the terms of said lease, the State was given the privilege of renewing the lease for a period of one year from the 18th day of January, A. D. 1905.

The lease was not renewed, but the State held over, with the consent of the lessors, until the 17th day of April, A. D. 1905, paying the rent according to the terms of the original lease.

The lessors claim that the State is responsible for the rent until the expiration of the second year, namely, January 17, 1906. This is the question involved, as I understand it, and upon which you desire advice.

It is a well established principle of the law relating to landlord and tenant that, after the expiration of a lease for a year, if the tenant holds over, with the consent of the landlord, the law treats him as responsible to him upon a hiring for another year, upon the same terms and conditions as those which controlled the antecedent tenancy.

Woods Landlord and Tenant, volume 1, section 13, page 28.
Schuyler vs. Smith, 51 N. Y., 309.
Wolffe vs. Wolff & Bro., 69 Ala., 549.

This doctrine is settled and declared in Colorado in the following terms:

"If a tenant, under a lease for a year, holds over after the expiration of his term, in the absence of a new agreement, he

holds the premises subject to the covenants and conditions contained in the original lease. The holding over rests not upon the former lease, but upon a new contract, which the law implies to be for the same time and upon the same terms with the lease under which the premises were held the preceding year."

See

Sears vs. Smith, 3 Colo., 288.
Reithman vs. Brandenburg, 7 Colo., 481.
Zippar vs. Reppy, 15 Colo., 260, 261.
Burkhard vs. Mitchell, 16 Colo., 376, 380.

Therefore I am of the opinion that the State is legally bound for the rent of said premises until the expiration of the second year; however, as the State no longer occupies the premises, and can not now make use of the same, I would suggest that a settlement of this matter be effected by compromise, if possible. I respectfully return herewith said lease and correspondence.

Respectfully yours,

N. C. MILLER,
Attorney General.

By W. R. RAMSEY,
Assistant Attorney General.

LIQUOR LICENSE.

A club organized for social purposes, which dispenses intoxicating liquors to its members without profit, but for which payment is made, comes within the provisions of 3 Mills (Rev.), 3810, requiring a State liquor license.

December 28, 1905.

HON. JOHN A. HOLMBERG,
State Treasurer,
Denver, Colo.

Dear Sir—In reply to your request for an opinion from this office as to whether The Delta Athletic Club, of Delta, Colo., is violating the law by dispensing intoxicating liquors to its members without first having obtained a State liquor license, in accordance with 3 Mills' (Rev.), 3810, I beg to advise you as follows:

It appears from the letter of Hugo Selig, Esq., district attorney for the judicial district in which Delta is situated, and from the letter of Milton R. Welch, Esq., attorney for the club,

written to the former, that Delta is a prohibition town; that The Delta Athletic Club is a regularly organized club, the membership of which is limited, and all applicants therefor must be balloted upon and duly elected; that such club is supported by membership dues; that the club maintains rooms, in which are kept pool and billiard tables, a punching bag and turning poles for the use of its members and their non-resident guests; that lunches and intoxicating liquors are served to such persons, but such guests can not themselves purchase any such liquors; that a United States government license has been obtained and is now held by said club; and that no other persons than those above mentioned can obtain admission to such rooms.

It is not clear from either of these letters how the liquors are distributed among the members, but we presume that the custom usually followed in clubs of this description prevails in this one, to wit, that the liquors are first purchased by the club as an entity and then sold to its members without profit, as ordered, being paid for either in money at the time, by chips previously purchased or distributed, or charged on account, which is later liquidated, the money obtained in each instance being turned into the club treasury and again invested in liquors.

The statute above referred to must be distinguished from those statutes regulating the sale of intoxicating liquors, as this one is for the purpose *only* of obtaining State revenue.

Parsons vs. People, 32 Colo., 221, 229.

It follows, therefore, that the ordinary rules defining what shall constitute dealing in intoxicating liquors do not apply in ascertaining what shall constitute a *sale* of such liquors under this statute, and it is with the latter only we have to do in this opinion.

Assuming that this club was organized in good faith as an athletic or social club, and was not organized for the chief purpose of evading the prohibitory ordinances of the town of Delta, or the licensing statutes of the State—in which latter case, of course, such handling of liquors would certainly be illegal—we have not been able to find that the question thus presented has ever been directly passed upon by the appellate courts of this State, although it has many times been passed upon by the highest courts of other states and of England and Canada. But such authorities are by no means harmonious—the one line holding that such furnishing of liquors by a club to its members is not a sale within the meaning of the laws regulating the liquor traffic, while the other line holds exactly to the contrary.

Black on Intoxicating Liquors, 142.
17 Am. & Eng. Enc. Law (2nd Ed.), 360-2.

The first line of authorities support the contention that no *sale* takes place in distributing such liquor to the members, upon

the ground that the members collectively constitute the club, and that, as the club purchases the liquor in the first instance, such purchase is in reality the act of the members themselves, and the liquor becomes their property; and that the distribution thereafter to the individual members is simply placing their own liquor before them, and the payment of the individual member for the liquor served him at its actual cost, is simply a mode of accounting by which the club's supply of liquor may be kept up for the use of its members.

To me this reasoning seems to be unsound, strained and illogical. It is self-evident that, in the first instance, the liquor was purchased by the club and owned by it as club property, the same as any individual might own it, and no member could appropriate it to his own use without an accounting therefor. When it is delivered to the individual member he pays the club for it in one of the ways above referred to, and the moneys therefore, regardless of profit or loss upon the liquor dispensed, passes from the individual member into the club treasury. The liquor then ceases to be club property and becomes the individual property of the member, to do with as he pleases. The money paid ceases to be his individual money and becomes the money of the club. If this transaction is not a sale of liquor from the club to the member, then the English language is wanting in words to express the transaction, which want immediately becomes apparent when we seek other words by which to express it.

The question of whether there is any profit made upon the *sale* is wholly immaterial in that hundreds of sales of all commodities are made every day without profit or even at a loss, but still such transactions are never the less *sales*. If such a distinction should be recognized in the liquor traffic, no conviction could ever be obtained against a person for *selling* intoxicating liquors, as he could successfully contend that the particular liquor dispensed had not been for profit, but at or below its actual cost and was disposed of only for the purpose of drawing trade in other lines.

That such dispensing of liquors constitutes the sale of the same under the statutes, I believe is amply supported by the better line of authorities as cited in Black on Intoxicating Liquors, *supra*, and the Am. & Eng. Enc. of Law, *supra*, and the reasons therefor are most forcibly and clearly set forth in the opinions of the respective courts in the following cases:

Hermitage Club vs. Shelton, 104 Tenn., 101.
People vs. Soule, 74 Mich., 250.
United States vs. Wittig, 2 Lowells (U. S.), 466.

It is undoubtedly true that any number of persons may associate together, contribute to a common fund for the purchase of intoxicating liquors and then may either divide the liquors

between them, or drink the same in common, without violating the law. But such a case is entirely different from the one under discussion, in that the liquors in this instance, after being purchased from the wholesaler, become and remain the property of the individuals as distinguished from the property of the club.

It will be noticed that the statute under discussion expressly mentions "clubs" in providing for the annual license fee to be paid the State, and in this connection the fact becomes pertinent that The Delta Athletic Club has obtained and holds a government license for the retailing of intoxicating liquors, which fact, under 3 Mills (Rev.), 3811, is *prima facie* evidence that said club is engaged in such business.

I am therefore of the opinion that this club is violating this provision of the State law, if operated in accordance with the above statement of facts.

Respectfully submitted,

N. C. MILLER,
Attorney General.
By I. B. MELVILLE,
Assistant Attorney General.

LIQUOR LICENSE.

Wholesalers who import liquors and sell them in the original packages to dealers only are subject to State liquor license fee of $25.00.

May 2, 1906.

HON. JOHN A. HOLMBERG,
State Treasurer,
State Capitol.

Dear Sir—In reply to your request for an opinion from this office as to whether the Henkel-Duke Company, Pueblo, is, under the statement of facts submitted by it, liable for the annual State liquor license provided for by section 18 of the revenue act of 1902, I beg to say that, referring to such statement, it appears that said company is a wholesale liquor merchant—a corporation under the laws of the State of Colorado; that it imports beer from Milwaukee, Wisconsin, and sells by the car or barrel to dealers only, and in the original packages; but that its principal business is wholesale groceries.

The reasons assigned for its non-liability under the provisions of this act are, briefly:

1. That it is really an agent for the Milwaukee brewery.

2. That it imports from Milwaukee and sells direct to dealers in the original packages.

3. That, as it does no retailing direct to consumers, it has no place of business within the meaning of the above section, and since the license fee required is really for the right to retail liquor at a given place, no license is required.

4. That wholesale liquor dealers are not included within the terms of this statute.

The reason advanced for its being an agent only, is that it has agreed with the brewing company to sell the latter's product at a stipulated price. Such an agreement could as well be made by a person or company buying the product direct—in fact, many manufacturers require such a compact—as it could with an agent. So that this is no proof of agency, even if the fact of such agency should relieve it from liability under the statute.

The fact that this beer is imported from another state in no wise relieves this company from liability under the provisions of this section, for the reason that immediately upon its arrival in this State it becomes subject to the operation and effect of our laws.

17 Am. & Eng. Enc. of Law, 291-4.

This company, according to its statement, is a corporation duly organized and existing under the laws of the State of Colorado, and has its place of business, including the distributing point of this liquor, at Pueblo; and, according to the general rule, at whatever point the liquor sold is distributed or delivered from, or the place where the amount of the specific order is separated from a larger quantity, is the place of sale.

17 Am. & Eng. Enc. of Law, 300.

The section of the revenue law under discussion, 3 Mills (Revised), 3810, provides that:

"Every person, company or corporation selling any malt, vinous or spirituous liquors, shall, in addition to other license fee exacted by law or by the ordinances of any municipality, pay to the State of Colorado an annual license fee of twenty-five dollars in advance for each and every saloon, restaurant, hotel, club, drug store, or other place where any said liquors shall be sold."

It is contended by this company that its wholesale place of business is not included in any of the places specified in this section, to wit, "saloon, restaurant, hotel, club, drug store or liquor store;" and that the closing portion, "or other places where any said liquors shall be sold," must be construed to mean a place similar to the particular places mentioned.

If we should accept the contention that the words "or other place where any said liquors shall be sold," as meaning other *similar* places to those specifically enumerated, to wit, "saloon, restaurant, hotel, club, drug store and liquor store," still, the company would be liable for this license fee.

The common meaning of the term "liquor store" is synonymous with "liquor house" and this term is universally used to designate a wholesale liquor dealer's establishment; and that this is the meaning intended by the Legislature is shown by the introductory words of this section, to wit: *"Every person, company or corporation selling* any malt, vinous or spirituous liquors, etc." There is no mention of retail dealers or of wholesale dealers, but *every person,* etc., selling, etc., is included in its provisions, and when such language is used, the general rule is that both are included; and no one can excuse himself for failure to take out a license by showing that he sells only in large quantities and not to individual consumers.

Black, Intoxicating Liquors, section 140.

Again, the intention of the Legislature is shown by the concluding portion of section 19 of the revenue act, providing the penalties for selling without a license, to wit: "And the possession of a license from the United States government for the sale of liquors, *either at wholesale or retail,* by any person, company or corporation without a State license, shall be prima facie evidence of guilt. There would certainly be no logical reason why the Legislature should provide that a government wholesale license should be prima facie evidence of guilt under a section referring to retail dealers only.

It is not material that this company's principal business is "wholesaling groceries," as the rule is, that all persons who engage in selling intoxicating liquors, whether exclusively or incidentally to other business, as a grocer or confectioner, must procure a license.

Black, Intoxicating Liquors, section 139.

I am of the opinion, therefore, that this company is equally liable, under the provisions of this section, with all other persons selling intoxicating liquors in this State, for the annual license fee.

Respectfully submitted,

N. C. MILLER,
Attorney General,

By I. B. MELVILLE,
Assistant Attorney General.

NATIONAL GUARD.

The military fund is subject to the same rules of legislation as are other funds, and can not be paid out for any purpose except such as are expressly authorized by law.

A review of the statutes authorizing expenditures out of the military fund.

January 12, 1905.

HON. A. E. BENT,
Auditor of State,
State Capitol.

Dear Sir—I have the honor to acknowledge the receipt of your request for my official opinion upon two questions:

1. In what form should the vouchers upon the military fund be approved; and

2. What claims are payable out of the military fund?

2 Mills' Annotated Statutes, section 3086, provides that:

"All accounts or claims payable from the military fund shall be paid on the order of the Adjutant General, approved by the Governor as Commander-in-Chief."

3 Mills' Annotated Statutes (2d Ed.), section 3088, provides that:

"All vouchers for transportation, subsistence, medical attendance (when not rendered by a medical officer of the service), supplies and quarters, and for the use of horses for the troops, shall be forwarded to the Adjutant General. When audited by the State Military Board and approved by the Governor, all such vouchers shall be paid from the military fund of the State."

3 Mills' Annotated Statutes (2 Ed.), section 3089, provides that payments under the preceding sections shall be made by the Inspector General, and no voucher for any such payment shall be audited unless certified as correct by the proper commanding officer and passed upon by the State Military Board.

Answering your second question:

2 Mills' Annotated Statutes, section 3082, provides that:

"The county commissioners of each county shall, at the time of levying the tax for county purposes, cause to be levied an annual poll tax of one dollar upon each male inhabitant over the age of twenty-one years, excepting active members of the National Guard and such other persons as may be exempt by law."

2 Mills' Annotated Statutes, section 3083, provides that the moneys collected from the above poll tax shall be kept by the

county treasurers, separate from other funds, and shall be by them transmitted quarterly to the State Treasurer, who shall place it to the credit of the military fund.

2 Mills' Annotated Statutes, section 3084, provides that:

"All moneys now in the hands of the State or county treas urers to the credit of the poll tax fund shall be placed to the credit of the militiary fund, above created."

See

People vs. Ames, 24 Colo., 422.

Opinions of Attorney General Carr, 1897-98, page 112.

It will be observed that the above cited sections of the statutes, providing for the levy and collection of the military poll tax, do not state for what purpose said fund is collected. The above sections provide for the levy and collection of the military poll tax, but do not provide for its disbursement. Provisions of the statutes for the levy of the tax and the creation of the fund do not amount to an appropriation of the fund.

3 Mills' Annotated Statutes (2d Ed.), sections 3028, 3080, 3099, 3104 and 3106, provide for the imposition of fines, which, when collected, shall be paid to the State Treasurer for the benefit of the military fund.

3 Mills' Annotated Statutes (2d Ed.), section 3064, provides that the Adjutant General shall,

"Under the direction of the Military Board, dispose to the best advantage of all arms, ammunition, accoutrements and warlike stores of every kind, the property of the State, that shall be deemed unsuitable for the use of the State, and shall pay the proceeds of such sale into the State treasury to the credit of the military fund."

In 1897 the General Assembly passed a new act concerning the enrollment and organization of the militia. Session Laws of 1897, page 182, chapter 63.

This act seems to be a codification of the military law.

2 Mills' Annotated Statutes, sections 3082, 3083 and 3084, above cited, together with sections 3085 and 3086, have no counterpart in the new military act. Mr. Mills, in his compilation of the third volume of Mills' Annotated Statutes (2d Ed.), suggests a question as to whether or not these sections of the statutes may not be repealed by implication.

3 Mills' Annotated Statutes (2d Ed.), section 3035, provides that:

"No part of the National Guard shall be taken outside of the State at any expense to said military fund or to said State."

While, as I have already said, the statutes creating the military fund do not provide for what purposes said fund is collected or shall be used, yet the name of the fund indicates that it is to

be collected for military purposes—that is, for the benefit of the National Guard—it is within the province of the Legislature to appropriate the fund so collected to any purpose it may see fit.

Attorney General Jones, in referring to the military poll tax fund, makes use of the following language:

"I reply that the military poll fund is subject to exactly the same rules as other funds, and can not be paid out for any purpose except such purposes as expressly authorized by law.

"I find no provision authorizing the employment of attorneys and paying for their services out of this fund."

Opinions of Attorney General Jones, 1889-1890 page 97.

An examination of chapter 84 Mills' Annotated Statutes, entitled "Militia," will disclose several sections in each of which will be found a legislative direction for expenditures to be paid out of the military fund. The sections mentioned are as follows:

3 Mills' Annotated Statutes (2d Ed.), section 3067, provides that the Governor is authorized to employ clerks who shall be members of the National Guard, hire offices, purchase fuel, lights, stationery and books for the military service, for the heads of military departments and recruiting officers, and is further authorized, by and with the advice and approval of the Military Board, to rent, hire, purchase, take title to and hold in trust for the use of the State of Colorado such buildings, lands, tenements and other appurtenances as may be, from time to time, deemed necessary for use as armories, and all such expenditures shall be paid out of the military fund.

Section 3068 of the same volume provides that the annual compensation in time of peace of the Adjutant General and of the Inspector General shall be payable monthly out of the military fund.

A prior statute (2 Mills' Ann. Stat., section 3065) provided that these salaries should be payable out of the general fund.

3 Mills' Annotated Statutes (2d Ed.), sections 3078 and 3088, provide that the Governor may order an encampment of the National Guard to be held each year. Said sections further provide that the expenses "when audited by the State Military Board and approved by the Governor" shall be paid from the military fund.

3 Mills' Annotated Statutes (2d Ed.), sections 3128 and 3132, provide for the employment of clerical assistants to the Adjutant General, whose salaries shall be paid out of the military poll fund.

I believe that the above mentioned sections of the statutes are the only sections specifically providing for the payment of claims out of the military fund.

Five separate sections of our statutes, hereinafter enumerated, provide for the purchase of property and supplies or authorize the expenditure of moneys, but do not specifically provide that the expense incurred shall be paid out of the military fund. These sections are all found in the military act, and it was, no doubt, the legislative intent that the expenses so authorized should be paid out of the military fund. The sections referred to are as follows:

3 Mills' Ann. Stat. (2d. Ed.), section 3064, provides that the Adjutant General shall, under the direction of the Military Board, purchase clothing, camp and garrison equipage, ammunition and such other military supplies as may be authorized.

Section 3066 of the same volume provides that the Adjutant General shall provide the several departments, on their requisition, with the necessary rosters, books of record, blank warrants, enlistments, discharges, rolls and other papers required by law and regulations, at the expense of the State.

Section 3074 of the same volume provides that the enlisted members of the National Guard shall be furnished by the Adjutant General with uniforms and equipment. Said section further provides that:

"The Adjutant General shall invite bids for furnishing uniforms as needed, which bids shall be submitted to the Military Board, which board shall direct the Adjutant General which bid to accept (if at all), or what course to pursue if all bids are rejected."

Section 3112 of the same volume provides that the Governor shall cause the military act to be printed and distributed to the National Guard.

Section 3121 of the same volume provides that:

"Every officer or soldier wounded or disabled while in active service, or who becomes ill by reason of such service, shall be taken care of and provided for at the expense of the State until he shall recover."

Under the provisions of 3 Mills' Annotated Statutes (2d Ed.), sections 3081 and 3114, officers and enlisted men serving under the orders of the Governor, or of the sheriff, mayor or judge, to prevent or suppress riot or insurrection, or officers ordered on court martial, or witnesses in attendance thereon, shall receive a specified compensation, payable out of the general fund.

I have not in this opinion considered any questions relating to the payment of pensions to members of the National Guard.

This department has previously decided that all printing and stationery supplies for the Adjutant General's department must be obtained through the Secretary of State.

Report of Attorney General, 1903-1904, page 134.

Respectfully submitted,
N. C. MILLER,
Attorney General.

By CALVIN E. REED,
Assistant Attorney General.

NATIONAL GUARD.

Power of the Auditor to pass on claims presented for payment.

His authority to inspect dodgers coming before him from boards authorized to audit and allow the same.

How vouchers against military fund shall be ordered paid, and how warrant shall be signed.

January 16, 1905.

HON. A. E. BENT,
Auditor of State,
State Capitol.

Dear Sir—In answer to your inquiry as to the power and duty of the Auditor of State concerning vouchers coming from the Military Department, I submit the following opinion.

I

DUTY AND LIABILITY OF AUDITOR OF STATE.

In order to answer your question fully, it will be necessary to first discuss the power and responsibility of the Auditor of State.

"He shall audit and settle all claims against the State payable out of the treasury except only such claims as may be expressly required by law to be audited and settled by other officers and persons."

Section 1821, M. A. S., volume 1.

"All persons having claims against the State shall exhibit the same, with the evidence in support thereof, to the Auditor, to be audited, settled and allowed within two years after such claim shall accrue, and not afterward."

Section 1822, M. A. S., volume 1.

"The Auditor, whenever he may think it necessary to the proper settlement of any account, may examine the parties, witnesses and others, on oath or affirmation, touching any matters material to be known in the settlement of such account, and for that purpose he may issue subpoenas and compel witnesses to attend before him and give evidence in the same manner and by the same means as allowed by law to courts of record."

Section 1824, M. A. S., volume 1.

"No warrant shall be drawn by the Auditor, or paid by the Treasurer, unless the money has been previously appropriated by law; nor shall the whole amount drawn for or paid under one head ever exceed the amount appropriated by law for that purpose."

Section 1827, M. A. S., volume 1.

"If the Auditor shall knowingly issue any warrant upon the treasury, not authorized by law, he shall be deemed guilty of a misdemeanor in office, and upon conviction thereof be fined in a sum four-fold the amount of such warrant, and imprisoned for any length of time not exceeding one year."

Section 1836, M. A. S.

"The Auditor and Treasurer shall each have power to administer all oaths and affirmations required by law in matters touching the duties of their respective offices."

Section 1847, M. A. S.

Reference to these particular statutes makes it plain that the people created the office of Auditor of State to do something more than clerical work. They invested him with extraordinary powers and imposed upon him severe duties and great liability, in order to guarantee protection against unjust expenditures of money. It is impossible for the Auditor to rid himself of this responsibility and duty, or to cast them off on other officers, upon whom they are not imposed by law.

"If the Auditor shall knowingly issue any warrant upon the treasury, not authorized by law, he shall be deemed guilty of a misdemeanor," and upon conviction, be fined in a sum four-fold the amount of the warrant, and imprisoned for any length of time not exceeding one year.

A statute similar to this, with reference to the county commissioners, was construed in the District Court of La Plata county, Colorado, after a protracted effort to minimize the force and effect of the statute by magnifying the significance of the word "knowingly." The District Court held that ignorance of the law would not exonerate the officer; that he is supposed to know the law.

Therefore, a reliance upon the signature of other officers, as a guaranty that the claim is a valid one, will not protect the Auditor from liability for the payment of an unjust claim when such officers are not charged with the performance of the duty they appear to have assumed.

II.

HOW VOUCHERS AGAINST THE MILITARY FUND SHALL BE DRAWN AND SIGNED.

"All accounts or claims payable from the military fund shall be paid on the order of the Adjutant General, approved by the Governor as Commander-in-Chief."

Section 3086, M. A. S., volume 3.

The act from which the foregoing section is quoted was passed during the session of the Legislature of 1889.

A question has been raised, as to whether or not it has been repealed by the act of 1897 concerning the militia. My conclusion is that it has not been repealed, and I offer the following reasons:

1. The act of 1889 was divided into separate articles, and the paragraph above quoted was included therein. The act of 1897 omitted this entire article and furnishes nothing in its stead or touching upon the subject matter of that article. Besides, the title of the act of 1889 clearly shows that one of the purposes of this enactment was "to provide for the more efficient collection of the military poll tax."

2. The title of the act of 1897 reads as follows: "An act concerning the enrollment and organization of the militia of the State of Colorado; prescribing the number and rank of the officers thereof, and defining the duties and salaries of such officers; and repealing all laws in conflict with the provisions of this bill."

The title of this bill, therefore, does not indicate that it is the purpose of the Legislature to interfere or alter the existing law in relation to the military poll tax, and the entire article being omitted, it is presumed that the Legislature did not intend to change it. This conclusion is reinforced by the title of the act of 1897, which shows that the Legislature did not intend to touch upon that subject.

3. If a revising statute contains an express repeal of all inconsistent acts and parts of acts, there is an implication that if there are parts of former acts not embraced in the new act and not inconsistent, they are not repealed.

Sutherland on Statutory Construction, section 155.

"The important question in these cases is whether the later act is intended by the Legislature to be a revision of the law re-

lating to the subjects within its purview. It can not be so intended unless it is a complete substitute for the previous law and contains the only rule or all the legislation which is intended to have force with regard to those subjects."

Id., section 156.

I am, therefore, of the opinion that all accounts or claims payable from the military fund shall be paid on orders signed by the Adjutant General and the Governor.

"Vouchers for transportation, subsistence, medical attendance, medical supplies and quarters, and use of horses for the troops serving in the field under orders from the Commander-in-Chief, shall be forwarded to the Adjutant General, who will pay the same when audited by the State Military Board and approved by the Governor."

3 M. A. S., section 3081.

Section 3078 provides that when troops are in the field to prevent or suppress riot or insurrection, they shall be paid out of the general fund.

"The Adjutant General shall advertise for bids to furnish uniforms, as needed, which bids shall be opened in the presence of the Military Board, which board shall direct the Adjutant General what bid to accept, or what course to pursue if all bids are rejected."

3 M. A. S., section 3070.

"For each twenty-four hours during the encampment, as provided in section 7, article V of this act, a definite compensation is provided for officers and enlisted men. Vouchers for transportation, subsistence, medical attendance, supplies and quarters, and for horses, shall be submitted to the Military Board for action, and approved by the Governor before the same are paid from the military fund of the State."

The foregoing expenses must be approved by the Military Board before vouchers can be honored.

"The Governor of the State of Colorado, by and with the advice and approval of the Military Board of the State of Colorado, as now constituted by law, is hereby authorized to employ clerks, who shall be members of the National Guard of the State of Colorado, hire officers (offices), purchase fuel, lights, stationery and books for the military service, for the use of heads of departments and recruiting officers, and the Governor is hereby authorized, by and with the advice and approval of the Military Board, to rent, hire, purchase, take title to and hold in trust for the use of the State of Colorado, such buildings, lands, tenements and other appurtenances as may be from time to time deemed

necessary for use as armories for the organized militia of the State of Colorado. All of such expenditures to be paid out of the military fund."

3 M. A. S., section 3067.

This statute amended section 3063, 2 M. A. S. A comparison of the original statute with the amended one shows that the purpose of the alteration was to require all these *contracts* to be submitted to and approved by the Military Board. But there is no provision after the contract is once made that the *bills* for the items mentioned in the statute must be submitted to and approved by the Military Board.

I am, therefore, of opinion that as to all of such expenditures which may be classified as clerical help in the Adjutant's General's office and the leasing of armories, the voucher need only be signed by the Governor and Adjutant General. And upon the presentation of such voucher it will be your duty to pay the same.

I do not consider that it is necessary for you to search the records of the Military Board to find out whether the contract underlying the creation of the debt has been passed upon by the Military Board; but I do hold that if your attention is called to the fact that the contract has not been made by the Military Board, but that the Adjutant General has proceeded solely upon his own authority, to contract such debts without the authority of the Military Board, then it will be your duty, upon receiving such notice, to make a thorough and searching investigation; and failure to do so, after receiving notice, will make you liable under the statutes above quoted. It is possible, indeed, it is likely, you act at your peril in all cases where there is no authority given to some board to audit the claim. You possess greater powers than the board of county commissioners, and certainly the members of that board can not absolve themselves from liability if they fail to scrutinize all accounts and determine if the law allows their payment. All vouchers should show the purpose of the expenditure and should be sufficiently itemized so that committees who examine the accounts can ascertain if the money was used for a legal expense.

My reason for this conclusion is that the statutes generally do not appear to invest the Governor and the Adjutant General with the power to create any such debt, and, therefore, their voucher for its payment is of no consequence when your attention is called to the absence of a proper contract. It is then your duty to refuse payment.

III.

APPROPRIATIONS.

There are two forms of appropriations recognized by the laws of Colorado. The most familiar form is the biennial appropriation made at each session of the Legislature. In the payment of moneys under this appropriation it is necessary to see that such moneys are not applied to a different object than that stated in the appropriation. Also, that warrants must not be drawn in excess of the appropriation, and all vouchers in excess should be rejected.

The principle stated with reference to this class of appropriations is equally applicable to all other appropriations.

The statute which authorized the levy and collection of the military poll tax does not appropriate or dedicate the fund to any definite purpose. It does not say what the tax is to be collected for, but the act concerning the militia makes various provisions for liability against this fund and the use to be made of it.

"No money shall be paid out of the treasury except upon appropriations made by law and on warrants drawn by the proper officers in pursuance thereof."

Section 33, article V, Constitution.

The military fund is to be turned into the treasury, and it can only be paid out in the manner prescribed by the Constitution. An appropriation is necessary in order to authorize warrants to be drawn on it; and the essential idea of an appropriation is two-fold—first, the amount is to be fixed, and, second, the specific object or use to be made of it must be designated. The law of Colorado does not allow any money to be paid out in the absence of an appropriation. The Legislature is exclusively vested with the power to make appropriations, and if the National Guard act does not provide the objects for which the military fund is to be disbursed, then it can only be paid out by specific appropriations passed by each General Assembly.

The Legislature has seldom seen fit to pass an appropriation directing how this fund shall be disbursed. It can only be paid out for the purpose mentioned in the act concerning the militia, if not otherwise appropriated by the Legislature.

There is, therefore, no authority for you to pay vouchers which on their face disclose the fact that the money is to be applied to some purpose not mentioned in the act concerning the militia, or where the voucher is so indefinite that you can not ascertain from it what the money is being expended for, because the responsibility is yours to determine that money is being ap-

plied to some one of the objects named in the act concerning the militia. And when you discover, by a reading of the voucher, that the money is to be misapplied to some purpose not mentioned in the act, it is your duty to reject the voucher and refuse payment. There is no authority possessed by the military board or the Adjutant General to apply this fund to any object not mentioned in the act regarding the militia.

It is therefore necessary to refer to the act concerning militia, found in 3 Mills (Revised Supplement), and also to the article concerning military poll tax, contained in 2 M. A. S., in order to ascertain what objects and purposes the military fund is appropriated to cover.

In short, when a claim is presented, it is the duty of the Auditor to find out by virtue of what law it is payable. This is precisely the reason for the creation of the office of Auditor of State.

My conclusion is that all vouchers must be signed by the Adjutant General and approved by the Governor as commander-in-chief.

As to those bills which must be allowed by the military board, I would suggest that you require the voucher to show on its face that it has been submitted to the military board and allowed. This you can require to be done by some proper means.

As to those debts which are created by the military board, such as leases for armories, the purchase of fuel, lights and stationery, the employment of a clerical force, etc., mentioned in section 3067, volume 3, Mills (Revised Supplement), I think you can proptect yourself by relying on the integrity and honor of the officials. When your attention is called to a failure to submit these matters to the military board before creating the debt, then it becomes your duty to inquire into the truth of the complaint, and, if sustained, to reject the vouchers.

It is unfortunate that the method of allowing the bills in the Adjutant General's office is not uniform, and the Legislature should pass an act providing for a uniform system of allowing claims.

Respectfully submitted,

N. C. MILLER,
Attorney General.

NATIONAL GUARD.

The Governor may issue license for organization of military company for drilling and marching in parades, which may be revoked by the Governor at any time. Section 2119 Mills (Rev.), 116, U. S., 252.

December 4, 1905.

HON. JESSE F. McDONALD,
Governor of Colorado,
State Capitol.

Dear Sir—In reply to your written request of the 29th ult., for an opinion from this office as to whether you can legally grant permission for the formation of a military company or club, not to be in anywise connected with the National Guard of Colorado, but to be organized for the purpose of drilling and marching in parades, and for this purpose to be allowed to possess and carry arms, I beg to say that such power is vested in you by section 2119 of 3 Mills' (Revised) Statutes, which provides:

"It shall not be lawful for any body of men whatsoever, other than the regularly organized National Guard or the troops of the United States, to associate themselves together as a military company or organization, or to parade in public with arms, in any part of the State, without the license of the Governor therefor, which may, at any time, be revoked; nor shall it be lawful for any city or town to raise or appropriate any moneys toward arming, equipping, uniforming, or in any way supporting or sustaining, or providing drill rooms or armories for such bodies of men; Provided, however, That this section shall not apply to the posts of the Grand Army of the Republic."

A statute similar to this one was passed upon by the Supreme Court of the United States in Presser vs. State of Illinois, 116 U. S., 252, and there held to be constitutional in all particulars; so that, in accordance with the provisions of this section, you have the authority to issue a license for the organization of such a military company or club, the existence of which may be terminated by the revocation of such license at any time, by yourself or any future Governor of this State.

Respectfully submitted,
N. C. MILLER,
Attorney General,

By I. B. MELVILLE,
Assistant Attorney General.

NATIONAL GUARD.

Brigadier General of National Guard in Colorado can be removed only for cause. This implies a trial before a court-martial, in accordance with the Articles of War.

The Articles of War are in force in Colorado where statutory laws have not been enacted governing the same subject.

General discussion of power of removal of appointive officers in Colorado.

June 27, 1905.

HON. JESSE F. McDONALD,
Governor of Colorado.

Dear Sir—In compliance with your request I have the honor to submit an opinion concerning the office of Brigadier General of the National Guard of Colorado. The opinion relates to the tenure of office of the Brigadier General.

On the 9th of January, 1905, Governor James H. Peabody issued an order removing and discharging General Chase, the Brigadier General, from the service. This order was made without any notice or hearing and without the action of a court martial, and purports to have been made for cause. At the same time, the Governor made an order appointing Colonel Edward Verdeckberg, vice John Chase, discharged. A controversy has arisen as to which of these gentlemen is entitled to the office of Brigadier General.

A proper determination of this controversy involves a consideration of the following questions, viz.:

General Chase having been legally appointed Brigadier General on the 1st day of January, 1901, was the order of removal and discharge a valid order?

LEGISLATION.

Under the statute of 1877 the Governor, by and with the consent of the Senate, was authorized to appoint "one or more Brigadier Generals for each division." Laws of 1877, chapter 65, section 3, page 616.

The act of 1879 also made the same provision, but repealed chapter 65 of the Laws of 1877. By the act of 1879 it was also provided:

"Field officers of battalions and regiments shall be elected by ballot, by the commissioned officers of such organizations, to serve for a term of three years, unless sooner discharged; and line officers shall be elected, in like manner, by members of their

respective companies, troops and batteries, to serve for a like term."

Laws of 1879, pages 118-119.

In 1883 the act of 1879 was amended, and authorized the Governor, "when required for active service in time of war, to appoint one or more Brigadier Generals, as necessity may demand, in the brigade or division organization." Said act was further amended as follows:

"In time of peace, and until the increased military strength of the State shall demand a reorganization, there shall be elected by a vote of the commissioned officers of the State, one Brigadier General (competent soldier), who shall command the first brigade, and hold office for the term of three (3) years, or until his successor may be elected and qualified, unless sooner removed for misconduct, or in case of the vacation of his office by resignation duly accepted."

Session Laws of 1883, page 241.

Gen. Statutes of Colorado, chapter 73, page 698.

On the 2nd day of April, 1889, chapter 73 of the General Statutes was repealed. See Session Laws of 1889, pages 383, 409.

Section 1, article III of the act of 1889 provides:

"In time of peace the Colorado National Guard shall constitute one brigade under the command of a Brigadier General."

Section 2 of said act provides:

"The Brigadier General shall be chosen from the field and line officers of the National Guard, and shall be elected by a vote of all such officers of the organized military force who have been duly commissioned, and he shall command the first brigade."

Session Laws of 1889, page 367.

Section 11 of said act provides:

"Field officers of battalions and regiments shall be elected by ballot, by the commissioned line officers of such organization; and line officers shall be elected in like manner by the members of their respective companies and batteries. * * * All commissioned officers hereafter elected shall hold their commissions for three years from the date of election."

Session Laws of 1889, page 390.

In 1893 an amendment to the act of 1889 was enacted, as follows:

"In time of peace the National Guard of Colorado shall constitute one brigade under the command of a Brigadier General,

and until the increased military strength of the State shall demand a reorganization, it shall be organized into regiments, battalions, troops and batteries, as herein provided."

Said act was also amended so as to provide:

"The organization, equipment and discipline of the National Guard of Colorado shall conform as nearly as practicable to the regulations for the government of the armies of the United States. The Governor shall appoint all general and field officers and officers of the general staff and shall commission them."

It was further provided that line officers shall be elected by ballot by their respective companies and batteries, and that all commissioned officers hereafter elected shall hold their commission for three years from date of election.

Session Laws 1893, pages 341-344.

"The Governor shall appoint all general, field and staff officers, and commission them. Each company shall elect its own officers, who shall be commissioned by the Governor; but if any company shall fail to elect such officers within the time prescribed by law, they may be appointed by the Governor."

Article XVII, section 3, Colorado Constitution.

"The organization, equipment and discipline of the militia shall conform, as nearly as practicable, to the regulations for the government of the armies of the United States."

Article XVII, section 2, Constitution of Colorado.

The foregoing is a brief review of the constitutional and legislative provisions applicable hereto, up to the year 1897.

By an act approved April 13, 1897, the Legislature made a complete revision of the laws governing the militia, and expressly repealed all laws and parts of laws in conflict therewith. Even if there had been no express repeal, the act of 1897 was intended as a substitute for all previous laws concerning the militia or National Guard. It is a familiar rule that when a new act is adopted covering the whole subject to which it relates, it will, by implication, repeal all prior statutes on that subject.

Cooley's Constitutional Limitations, page 217, Note 1, and cases cited.

Our own Supreme Court has said:

"A subsequent statute revising the whole subject matter of a former statute, and evidently intended as a substitute for

it, although it contains no express words to that effect, must operate as a repeal of the former."

Koose vs. City of Denver, 10 Colorado, 112-122;
Edwards vs. D. & R. G. Ry Co., 13 Colorado, 59-64.

The law of 1897 was the only statutory law relating to the National Guard in force at the time of the appointment of General Chase as brigadier-general, except, of course, the constitutional provision. It is therefore important to examine this law.

Article III, section 2, of the act of 1897 provides:

"The organized militia shall be designated the 'National Guard of Colorado.' In time of peace, the National Guard of Colorado shall consist of the staff of the commander-in-chief; a Quartermaster and Commissary General's Department; a Medical Department; one brigade under the command of a brigadier general and a retired list."

Session Laws 1897, pages 186-187.

Section 13, article III, of the act of 1897 provides that all commissioned officers hereafter elected shall hold their commissions for three years from the date of election. It is also provided by section 1 of article III of said act:

"The Governor * * * shall, immediately upon assuming his office, appoint an Adjutant General, who shall be chief of staff, with the rank of Brigadier General, and who shall act as quartermaster and commissary general; one Assistant Adjutant General, with the rank of colonel; one Inspector General, with the rank of colonel, who shall act as paymaster general; one Surgeon General, with the rank of colonel; two or more Aides de Camp, and a Military Secretary, each with the rank of colonel; all to take office on April first after the inauguration of the Governor, and to serve for two years, unless sooner removed by him; Provided, That the Governor shall have power to remove, *for cause,* any and all of said officers and to fill vacancies."

Section 30 provides:

"The service of every enlisted man shall be for the term of three years, unless he be properly discharged."

Section 1, article V, provides:

"The National Guard of Colorado shall be governed by the military laws of the State, the Code of regulations, the orders of the Governor, and wherever practicable, by the regulations, articles of war and customs of the service in the United States Army."

By section 1 of the act approved April 14, 1903, it was provided:

"The brigade shall consist of not more than one signal corps, one squadron of cavalry, one light battery of artillery, and two regiments of infantry, each of which shall consist of such officers, non-commissioned officers and enlisted men as the Governor of the State, upon the advice and approval of the military board, may from time to time prescribe; Provided, That the organization of the said signal corps, squadron of cavalry, light battery of artillery, and two regiments of infantry, shall at all times conform, as nearly as the conditions of the service will justify, to the organization of similar bodies in the army of the United States."

Session Laws of 1903, page 358.

It will be observed that the Constitution and statutory laws of the State of Colorado are silent as to the tenure of office of the Brigadier General, and were so at the time General Chase was appointed and when the order was made intending to remove him.

It is significant that the Legislature, in the revision of 1897, failed to limit the commission of the Brigadier General, while it preserved the limitation as to the other commissioned officers and enlisted men. It is apparent that this change was not a mere oversight, but was an intentional alteration of the law.

The acts of 1879 and 1889 limit the term of office of Brigadier General to three years, and the act of 1893 did not alter it. The term of all staff officers is fixed at two years under the act of 1897.

The National Guard of Colorado is governed by the regulations, articles of war and customs of the service in the United States army, wherever the same are applicable. The Constitution, as well as the statutes, command that the National Guard shall conform, as nearly as possible, to the regulations for the government of the army of the United States, in respect to organization, equipment and discipline.

In Colorado the commission issued to the Brigadier General provides that it shall continue in force during the time prescribed by the Constitution and laws of the State of Colorado.

There is no statute or article of war in the laws of the United States fixing the tenure of army officers. This is controlled by the customs of the service, articles of war and regulations for the army.

Under the regulations, articles of war and customs of the service in the army of the United States, the tenure of office of all brigadier generals is during good behavior. While the statutes of the United States do not fix the tenure, the right to hold commission during good behavior is unquestioned.

POWER OF REMOVAL.

It is a general rule that the power of removal is incident to the power of appointment. Its application, however, is limited to instances where the law does not regulate the cause or mode of removal.

Before entering upon a full discussion of this question, we desire to refer to the case of Blake vs. U. S., 103 U. S., at page 233, for the purpose of showing that the principles applicable to the tenure of office of civil and military officers are the same. Attorney General Cushing said:

"I am not aware of any ground of distinction in this respect, so far as regards the strict question of law, between officers of the army and any other officers of the government. As a general rule, with the exception of judicial officers only, they all hold their commissions by the same tenure in this respect. Reasons of a special nature may be deemed to exist why the rule should not be applied to the military in the same way as it is to civil officers, but the legal applicability to both classes of officers is, it is conceived, the settled construction of the Constitution. It is no answer to this doctrine to say that officers of the army are subject to be deprived of their commissions by the decision of a court-martial. So are civil officers by impeachment. The difference between the two cases is in the form and mode of trial, not in the principle, which leaves unimpaired in both cases alike the whole constitutional power of the President.

" 'It seems unnecessary in this case to recapitulate in detail the elements of constitutional construction and historical induction by which this doctrine has been established as the public law of the United States. I observe only that, so far as regards the question of abstract power, I know of nothing essential in the grounds of legal conclusion, which have been so thoroughly explored at different times in respect to civil officers, which does not apply to officers of the army.'

"The same officer, subsequently, when required to consider this question, said that 'the power has been exercised in many cases with approbation, express or implied, of the Senate, and without challenge by any legislative act of Congress. And it is expressly reserved in every commission of the officers, both of the navy and army.' 8 Opin., 231.

Such was the established practice in the Executive Department and such the recognized power of the President up to the passage of the act of July 17, 1862, c.200 ,(12 Stat., 596)."

See, also,

Opinions Attorneys General U. S., volume 4, page 612.

The Constitution of the United States is silent as to the power of the President to remove officers.

The decisions referring to this question may be grouped under three classes:

First—Where the Constitution and laws are silent as to the manner and cause of removal.

Second—Where the Constitution and statutes provide for the cause and manner of removal.

Third—Where the Constitution of the State expressly affirms the power of removal as being incident to the power of appointment, in all cases where the Constitution and statutes creating the office are silent as to the duration of the office.

The Constitution of New York and several other states provide as follows:

"When the duration of any office is not provided by the Constitution, it may be declared by law, and if not so declared, such office shall be held during the pleasure of the authority making the appointment."

Article X, section 3, Constitution of New York.

Also,

People vs. Robb, 126 N. Y., at page 183.

The power of the President to remove officers as an executive act was not conceded without protest in the early history of our government, but the President insisted upon the right as a prerogative of his office. He claimed that the right of removal was an executive act. Whatever complaints there may have been against the exercise of this power on the part of the President, it was persisted in, and finally approved.

"Mr. Madison and others insisted that the appointing power and the removing power were executinve functions, and that the President, as chief executive officer, would, but for the special provision of the Constitution, have had the appointment, as well as the removal, of the officers of the government. But he argued that the power to appoint was really in the President, qualified by the necessity of the concurrent advice and consent of the Senate, and that as he was the appointing power, subject only to this qualification, the power of removal was not subject to any such qualification, and that he, as the appointing power, could remove without requirement of the concurrence and advice of the Senate. Accordingly, in the bills which were passed by the First Congress for the creation of the heads of the Executive Departments, the power of appointment of the various Secretaries of those departments was, by that act, accorded to the President, by and with the advice and consent of the Senate, with these words added: 'to be removable from office by the President of the United States.' It was moved to strike out these words because it was contrary to the Constitution to give the President the power of removal when he appointed the officer by and with the advice and consent of the Senate. The motion to strike out was de-

feated, and the House passed the bill with the power of removal in the President alone, by a vote of 34 to 20. It was passed in the Senate by the casting vote of the Vice-President, and the bill was approved by President Washington."

Tucker's Constitutional Law, volume 2, page 734.

It will thus be seen that there was considerable contention and strife before the doctrine was recognized that the power to remove was incident to the power to appoint, even in the case of the President of the United States, and the debates and treatises on the recognition of this power at that time say that the high character of the incumbent (Washington) had a great deal to do with its acceptance.

Nevertheless, the doctrine has received full recognition in the courts, and it is now too late to question it. But we must bear in mind that all the decisions of the United States courts in reference to this power are under a Constitution and code of laws which are silent on the question of removal. Many of the decisions which we have examined come from states where the Constitution provides that if the term of office is not limited by law, it shall be held during the pleasure of the authority making the appointment.

The second class of cases which we have mentioned is more rare, and they occur under Constitutions and statutes which prescribe the manner and cause of removal. We think that there is no doubt that Colorado belongs to the second class, and this interpretation of our laws is re-enforced by Justice Thompson in *Benson vs. People,* 10 Colo. App., 175-176. The court, in speaking of the right of the Governor to remove a member of the Board of Agriculture, and referring to the act creating the Board, said:

"The act contains no provision for the removal, in any manner, or by any authority, of any member of the Board. If the power to remove Mr. LaGrange was lodged in the Governor, it must be found outside of this statute. From what course the Governor can see that his authority in this instance was derived, he did not indicate in his order of removal; but unless it is conferred by the Constitution or by some statute, it has no existence."

We desire to quote the provisions of our Constitution and statutory law which are applicable to cases of removal, and we believe that they cover every variety of case except where the act creating the office provides that the tenure shall be at the pleasure of the appointing power.

"The Governor shall nominate, and by and with the consent of the Senate, appoint all officers whose offices are established by this Constitution, or which may be created by law, and whose appointment or election is not otherwise provided for, and may remove any such officer for incompetency, neglect of duty, or malfeasance in office."

Section 6, article IV, Const. Colo.

"All officers not liable to impeachment shall be subject to removal for misconduct or malfeasance in office, in such manner as may be provided by law."

Section 3, article XIII, Colo. Const.

"The term of office of all State officers hereafter appointed by the Governor, except those whose terms of office are otherwise fixed by law, shall commence on the first Wednesday of April next after their appointment, and shall continue for a term of two years, subject to the right of the Governor, at any time, to remove such incumbent for incompetency, neglect of duty or malfeasance in office."

Session Laws 1885, page 330.

Section 1, article III, of the Military Code of 1897 provides that the Governor shall have power to remove for cause any and all of the officers mentioned in this section, and to fill the vacancies so created.

The constitutional provision concerning removals covers all cases where the office is established by the Constitution, or which may be created by law, and where the appointment or election is not otherwise provided for. This section would not cover the case of Brigadier General, for the reason that his appointment is otherwise provided for. But section 3 of article XIII provides that all officers not liable to impeachment shall be subject to removal for misconduct or malfeasance in office in such manner as may be provided by law. In pursuance of this provision of the Constitution, the Legislature enacted, in 1885, the section we have quoted which fixes the tenure of office of all officers whose terms are not otherwise prescribed by law, at two years, subject to removal for incompetency, neglect of duty or malfeasance in office.

It is our opinion that under the laws of Colorado, an appointive officer can not be removed except for good cause, upon proper hearing, and in ordinary cases the finding is not subject to review. This was our conclusion in regard to the removal of the members of the St. Louis Board of World's Fair Managers of Colorado.

"Where an officer is appointed during pleasure, or where the power of removal is discretionary, the power to remove may be exercised without notice or hearing. But where the appointment is during good behavior, or where the removal can only be for certain specified causes, the power of removal can not be exercised, unless there be a charge against the officer, notice to him of the accusation, and a hearing of the evidence in support of the charges and an opportunity given to the party to make a defense."

Aldermen of Denver vs. Darrow, 13 Colo., 460-8.

We do not believe that the Legislature intended that all officers covered by section 6, article IV, of the Constitution, and by the act of 1885, should have the benefit of the preferment of charges and a trial, and that all military officers mentioned in section 1, article III, of the act of 1897, concerning the National Guard, should be removed only for cause, while the Brigadier General, one of the most important officers of the State, should be denied the right of a hearing. The right to relieve this officer from command secures to the commander-in-chief a choice as to his officer in the field, while the high character of the commission held demands that it shall not be taken away except for cause. Such has been the rule in the army of the United States since 1866.

The important change in the act of 1897 omitted the term of office of the Brigadier General, and left it open, while it adopted the articles of war and customs of service of the United States army; so it was intended that that high and important office should be removed from the fluctuating and dangerous conditions of politics, and that the head of the National Guard should be permanent.

Moreover, the constitutional provisions and the statutory enactment quoted cover all imaginable cases, and we can not conceive of a State officer being removed in Colorado except for neglect of duty, malfeasance in office or incompetency, except where the statute authorizes his appointment during the pleasure of the Executive. The statute covers all cases omitted by the Constitution. We do not consider it important to discuss the two-year limit, mentioned in the act of 1885, because at the time that act was passed, the term of office of the Brigadier General was three years, and when the revision was made in 1897, the adoption of the regulations and articles of war and customs of service of the United States army was the purpose of making the same control where applicable. So far as the term of office of the Brigadier General is concerned, we believe it is controlled by the rules, articles of war and customs of service of the United States army, and that they become as much a part of the military code of Colorado as if they had been incorporated into it.

Moreover, the act of 1885 dispenses with the ordinary rule which is to the effect that where a statute creates an office without fixing the tenure, it is subject to the pleasure of the appointing power. The effect of this statute is to fix the tenure of office where not otherwise provided for by law, and that officers shall be removable only for the causes mentioned, namely, incompetency, neglect of duty or malfeasance in office. So that the only class of officers in Colorado subject to removal at the pleasure of the Governor are those where the act expressly provides for such removal.

"That the Legislature, possessing this power of appointment to offices local in their nature, created by law, submitting to the

Governor the appointments, may restrain the power of removal, may modify the tenure of the office, can not, I think, be justly questioned. The power granted by the Constitution to the Governor to appoint, necessarily carries with it, in all offices where the tenure is during pleasure, the incidental power of removal. But where the duration of the office is fixed by the law creating it, and where there is a provision for removal during the time limited for the continuance in office, it would seem to me that the officer is not removable, except in the manner prescribed by the law. This incidental power of removal is not expressly given by the Constitution, and it extends only by necessary implication to such offices as the Governor possesses exclusively the power of appointment to under the Constitution, or the power is granted to him by the law creating the office, *where there is no restriction on the power of removal."*

Commonwealth ex rel. Lehman vs. Sutherland, 3 S. & R., 144, 154.

The Constitution and statutes of Colorado allow removals only for neglect of duty, malfeasance in office or incompetency, unless the statute or constitutional provision creating the office fixes the term of office during the pleasure of the Governor.

ARTICLE OF WAR NO. 99.

"No officer shall be discharged or dismissed from the service except by order of the President, or by sentence of a general court-martial; and in time of peace, no officer shall be dismissed except in pursuance of a sentence of court-martial, or in mitigation thereof."

This article of war is part of the military code of Colorado—as much so as if it were printed in the act itself. It is asserted, however, that the article is not applicable for the reason that it had in view a contingency entirely different from the one presented by the case before us. It is said that the appointing power in the case of the national government is the President and Senate jointly; and, on the other hand, it is pointed out that the Governor of Colorado alone appoints the Brigadier General.

We have already quoted from eminent jurists to demonstrate that the power of removal claimed and exercised by the President of the United States was insisted upon as a prerogative of the Executive, and that while the appointing power was qualified by the necessity of a confirmation by the senate, there was nothing in the Constitution which deprived the Executive of the right to remove without action on the part of the senate. The removing power of the Executive is unlimited by the federal Constitution.

It was the claim of President Madison that the removal of appointees is an exercise of the executive power, and this is the general opinion of jurists. The 99th Article of War was

passed for the purpose of curtailing the executive power and limiting the exercise of that power in the case of removal of military officers. The article had in view the correction of an abuse, and while it was passed during the strenuous times of Andrew Johnson's administration, nevertheless, Congress has never seen fit to repeal this act, and if the power of removal claimed and exercised by the President from the time of Washington down to the year 1866 could not be permitted to go on without restraint, and if it has appeared wise in the case of the federal government to continue this article, we can see no good reason for saying that it is not applicable in state affairs, where the question of politics is apt to have more influence.

Section 1, article V, of the act of 1897 declares that the articles of war governing the United States army are adopted in Colorado, so far as they are applicable. The burden rests upon him who would eliminate any particular article of war, to show good reason why it is not in force in Colorado. It is not a sufficient answer to say that this article was adopted because the President insisted upon removals without the action of the Senate. Nor is it enough to say that the President may supersede an officer in the service by appointing some one else and securing his confirmation by the Senate.

But, it is said that the 99th Article of War has no application when the appointing power is the Executive without the approval of the Senate.

The answer to this objection is that the power of removal is an exercise of the executive power, and it is this precise power that the 99th Article of War limits. The principle that the power of removal is incident to the power of appointment, can have no application when both powers are lodged in the Executive. An express abridgment of the executive power to remove can not be made to give way to an implied power to remove. Statutes can not be repealed, modified or dispensed with in any such manner.

The appointing power in the federal government consists of the right of the President to nominate and of the Senate to confirm. The President early asserted that it was his prerogative to remove officers as a part of his executive power. The claim and exercise of this power on the part of the President was acquiesced in during various administrations until 1866, when Congress believed it necessary to curtail the executive power in this respect. The effect of the 99th Article of War is to diminish the power of the Executive by taking away from him the power of removal except upon trial by court-martial. The effect of the 99th Article of War is to diminish the power of the Governor to the same extent. The purpose was to prevent an abuse, and the article must be interpreted in view of the evil to be remedied. Congress found it necessary to limit the executive power with reference to the removal of military officers.

The adoption of the article limits the executive power of the Governor in the same manner.

There is no reason to be urged in favor of the limitation of the executive power of the President which does not apply with equal, or even greater, force in the case of the Governor.

We may conclude with a quotation from the decision in *DeBuc vs. Voss,* 19 La. Ann., 210; 92 Am. Dec., 526, in which the court uses the following language:

"There is no need in this case to go far into the inquiry whether the power to appoint to office implies the power to remove. A mere arbitrary power to remove, depending solely upon the will or caprice of the Executive and to be exercised without good cause, the *sic volo sic jubeo* principle, was surely never accorded by the genius of American institutions. The doctrine of Mr. Madison in regard to the right of removal by the President of the United States, was founded in considerations of public utility, and proceeded upon the assumption that the power of removal, in the hands of that high functionary, would be exercised with a nice discretion, and for right purposes. But in the progress of time it has been found that this right is liable to abuse, even by the chief executive officer of the nation, and the last Congress has wisely limited its exercise."

Our conclusion is that every appointive officer in the State of Colorado is subject to removal for neglect of duty, malfeasance in office or incompetence, unless otherwise provided by law. This provision is embodied in the Constitution and re-enacted in the statute of 1885.

The two provisions of law construed together seem to allow no appointive officer to escape. But in the case of military officers, the preferment of charges carries with it, under the regulations and customs in the service of the United States army, the right of a trial by a court-martial or an investigation by a court of inquiry.

We believe that it would be impossible to conceive of a case of an officer or citizen of the United States preferring charges against an army officer without according to him the right of a trial by court-martial or an investigation by a court of inquiry. In fact, the Articles of War make explicit provision for a hearing of all such charges.

The order of Governor Peabody provided for the removal of General Chase, *for cause.* The authorities already cited from this State and others, show that a removal for *cause* must be accompanied by a statement of the cause, and notice and hearing. These essentials were not complied with in the attempted removal of General Chase, and the failure to do so renders that order void and of no effect, and its issuance did not in any manner operate to remove General Chase from the service.

Moreover, we do not believe that it was possible for the Governor to remove General Chase except for cause, but it is our opinion, based upon the Articles of War and the opinions cited, that a trial must be had by court-martial and that the preferment of charges against a military officer always carries with it the right to such a hearing. The adoption of the regulations, Articles of War and customs in the service of the United States Army guarantees this right to every commissioned officer of the National Guard of Colorado.

It is argued that it would be impossible to get rid of an officer of the National Guard under such conditions. We see no difficulty growing out of this question, either in the case of the National Guard of Colorado or in case of the United States Army. An officer who is unfit for duty can always be relieved from his command.

An officer who is unfit for service may be retired, but, under the Articles of War, such retirement carries with it the right to an investigation by a retiring board.

We further point out that the right of any person to an office in Colorado is not a vested right, and may be changed, extinguished or altered at the pleasure of the Legislature, unless otherwise secured by the Constitution.

Taylor vs. Beckham, 178 U. S., 548.
Blake vs. U. S., 103 U. S., 227.
Ex parte Hennan, 13 Peters, 259.
Crenshaw vs. U. S., 134 U. S., 99.

We have read all the authorities submitted to us, but none of these authorities sustain the right of the executive to remove a commissioned officer in the army, in time of peace, without sentence of court-martial.

The law is summarized in the following extract from Street vs. United States, 24 Court of Claims Report, pages 230, 248:

"The purpose of the act 17th July, 1866, was not to attach a life tenure or element of vested right to the office, but to save officers 'in time of peace' from the ignominy of a hasty and dishonorable dismissal. The practical results of the statute, in connection with the other provisions of law bearing upon the subject, are these: that in time of war the President may dismiss an officer from the service at any moment and for any cause; that in time of peace he may dismiss him for cause with the cooperation of a court-martial, or remove him without cause with the consent of the Senate."

We have gone into this matter at great length, and we are unable to reach any other conclusion than that the order made by the Governor on January 9th, 1905, is void, and therefore, did not remove General Chase from the office of Brigadier

General; that the appointment of Colonel Verdeckberg to the position of Brigadier General was illegal and void, because the law provides for only one Brigadier General.

Respectfully submitted,

N. C. MILLER,
Attorney General.

and W. R. RAMSEY,
Assistant Attorney General.

NATURALIZATION.

The County Courts of this State, under the new naturalization law enacted by Congress, June 29, 1906, do not have jurisdiction to naturalize aliens.

August 16, 1906.

HON. JESSE F. McDONALD,
Governor of Colorado,
State Capitol, Denver.

Dear Sir—I beg to acknowledge receipt of your communication of August 15, enclosing a letter from the Hon. F. W. Sargent, Commissioner General of the Department of Commerce and Labor, a copy of the new naturalization law and a copy of the circular letter transmitted by you to all the judges of this State concerning said law, and in compliance with your request for an opinion from this office as to the jurisdiction of County Courts under said law, I have the honor to call your attention to section 3 of said law, which was approved June 29, 1906. Said section provides that exclusive jurisdiction is conferred upon certain United States Courts mentioned therein, and also "all courts of record in any state or territory now existing, or which may hereafter be created, having a seal, a clerk and jurisdiction in actions at law or equity, or law and equity, in which the amount in controversy is unlimited."

The County Courts of this State are limited as to jurisdiction by a constitutional provision. See article VI, section 23, Colorado Constitution.

As our County Courts are thus limited as to jurisdiction, I am of the opinion that the new law which goes into effect ninety days from the date of its passage, does not confer naturalization jurisdiction upon such courts, and that, under the provisions of

said law, our County Courts will not have the power to naturalize aliens.

Respectfully yours,

N. C. MILLER,
Attorney General.

By W. R. RAMSEY,
Assistant Attorney General.

NOTARIES PUBLIC.

A single woman holding commission as notary public, upon marriage, forfeits such commission.

December 29, 1905.

HON. JAMES COWIE,
Secretary of State,
Denver.

Dear Sir—In reply to your request for an opinion as to whether a single woman, who has been duly appointed a notary public in this State, can continue, after marriage, to act in such capacity under the original appointment, I beg to say that while the marriage in itself would be no bar to such continuance of authority, still, on account of the requirements of our statutes for authenticity, the acknowledgments of notaries and for recording their commissions, there would be no way of properly showing that the woman so married—which marriage legally changes her surname to that of her husband—is the same person to whom the notarial commission was issued; and, as she can no longer legally use her former name, all acknowledgments taken and official acts performed by her would lack that authenticity to which those requiring such services are entitled, and for this reason, if no others existed, public policy demands that her commission should be forfeited.

Respectfully submitted,

N. C. MILLER,
Attorney General.

By I. B. MELVILLE,
Assistant Attorney General.

NOTARY PUBLIC—ELIGIBILITY.

A notary public must be a qualified elector, and a resident of the county for which he is appointed.

July 22, 1905.

HON. JAMES COWIE,
Secretary of State,
Denver, Colo.

Dear Sir—In answer to your inquiry as to the law relating to the appointment of notaries public, I would say that the statute provides that the Governor shall appoint and commission in each county, as occasion may require, one or more notaries public, who shall hold their office for four years, unless sooner removed.

1 M. A. S., section 3277.

In some states a notary public is held to be a state officer, and is authorized to act as such throughout the state, but in this State it is held by the Supreme Court that, although a notary public holds his office by the appointment of the Governor, he can exercise the functions thereof only in the county for which he is appointed, and that in this sense he is a county officer.

See,

In the Matter of House Bill 166, 9 Colo., 628.
Hill vs. Bacon, 43 Ill., 477.

It is necessary that a person shall be a qualified elector in order to be eligible to appointment as a notary public, and that he must be a resident of the county for which he is appointed.

Our Constitution provides that:

"No person shall be eligible to any county office unless he shall be a qualified elector."

Colorado Constitution, section 10, article XIV.

The term "qualified elector," as employed in the foregoing constitutional provision, is used in its broadest sense, meaning a person qualified to vote generally.

Respectfully yours,

N. C. MILLER,
Attorney General.

By W. R. RAMSEY,
Assistant Attorney General.

NUISANCE—POLLUTION OF WATER IN BUCKSKIN CREEK—REMEDY.

To pollute water in a stream so as to render the same offensive or unwholesome to the town, county, village or neighborhood thereabouts is a nuisance, punishable by fine, and may be removed or abated by proper proceedings in District Court.

April 5, 1906.

DR. HUGH L. TAYLOR,
Secretary State Board of Medical Examiners,
Denver, Colo.

Dear Sir—I am in receipt of your communication, dated April 2, 1906, enclosing certain correspondence from Frank B. Young, State water inspector, in relation to William Frasier, of Alma, Colo., in which it is claimed that Mr. Frasier is polluting the water in a stream called "Buckskin," and is thereby creating a nuisance.

The matter is submitted to this office for advice and instructions as to the proper course to pursue.

In compliance with your request, I desire to say that this matter should be brought to the attention of the district attorney of the Eighth Judicial District. His name is Augustus Pease, and he is located at Canon City.

Your attention is also called to section 1357, 1 M. A. S., page 943, which provides:

"If any person shall obstruct or injure or cause or procure to be obstructed or injured, any public road or highway, or common street or alley of any town or village, or any public bridge or causeway, or public river or stream declared navigable by law, or shall continue such obstruction so as to render the same inconvenient or dangerous to pass, or shall erect or establish any offensive trade or manufacture or business, or continue the same after it has been erected or established, or shall in any wise pollute or obstruct any water course, lake, pond, marsh or common sewer, or continue such obstruction or pollution, so as to render the same offensive or unwholesome to the county, town, village or neighborhood thereabouts; every person so offending shall, upon conviction thereof, be fined not exceeding three hundred dollars; and every such nuisance may, by order of the District Court before whom the conviction may take place, be removed and abated by the sheriff of the proper county, and any inquest and judgment thereon had under the provisions of any law authorizing a writ of *ad quod damnum* shall be no bar to a prosecution under this section."

I think if this matter is taken up before the district attorney, that he will institute a prosecution against Mr. Frasier for the violation of this law, and that the desired relief may be thus obtained.

I return herewith the correspondence from Mr. Young.

Yours truly,
N. C. MILLER,
Attorney General.

By W. R. RAMSEY,
Assistant Attorney General.

PEDDLER'S LICENSE.

On all itinerant vendors' licenses issued by county clerks, they should collect an additional fee of $2.50 for the State, in accordance with Section 20 of Revised Act.

January 17, 1906.

HON. JOHN A. HOLMBERG,
State Treasurer,
Capitol Building, Denver.

Dear Sir—In reply to your request for an opinion from this office as to whether county clerks should collect the additional fee of two dollars and fifty cents, as provided for by section 20 of the Revenue Act of 1902 (3 Mills' Rev., 3812), when issuing a license in accordance with the provisions of the Itinerant Vendors' Act of 1905 (Session Laws '05, page 274), I beg to say that section 20, *supra*, is practically the same as section 22 of the Revenue Act of 1901,—from which the former act was copied,—the only difference being that the latter section provided, *inter alia*, that "All such fees shall be accounted for and paid over to the Treasurer of State, at the *times* and in the manner prescribed *by the last preceding section;*" while the substituted clause in section 20, *supra*, reads "All such fees shall be accounted for and paid over to the Treasurer of State, at the *time* and in the manner prescribed *in section 18.*"

It will be noticed by reading the Revenue Act of 1901 that the "preceding" section referred to in section 22, *supra*, did not in any way relate to the "times and manner" of paying over fees to the State Treasurer, but that section 18 of such act did provide for the collection of a fee from litigants by clerks of courts of record and county judges, and further provided for the "times and manner" of accounting for and remitting such fees to the

State Treasurer, and to this latter provision of section 18 the clause quoted from section 22, supra, to wit, "the last preceding section," undoubtedly refers, and so in the revision of this act as passed in 1902, such correction was made. But as the provision relating to the collection of such court fees was not reenacted in the act of 1902,—both section 18 and section 19 of the act of 1901 being omitted therefrom,—that portion of section 18 providing for the "times and manner" of accounting for and remitting such fees to the State Treasurer, was also omitted, and sections 20, 21 and 22 of the act of 1901 became sections 18, 19 and 20 of the act of 1902, so that section 18 of the present act in no way refers to the "time and manner" of accounting for and remitting such fees to the State Treasurer.

From this omission it might be claimed, and probably is, that as there is no provision in the act of 1902 as to the "time and manner" of accounting for and remitting such fees to the State Treasurer, and no penalty provided for a failure to perform the duties imposed by section 20, supra, the latter section is inoperative and void.

However, I am of the opinion that this omission in nowise invalidates the express provisions of section 20, which only adds to the other duties already imposed upon the county clerk the additional one of collecting two dollars and fifty cents upon each license issued by him, excepting "marriage licenses;" that the performance of such additional duty becomes a part of the duties which his oath of office requires him to perform, and for the due performance of which he is required to give a bond in the form provided for by 1 M. A. S., 828; that the wording of section 20, supra, is sufficiently clear and complete in itself as to the duty of the county clerk in accounting for and remitting to the State Treasurer the fees collected by him, without the words "at the time and in the manner prescribed in section 18;" and that in accordance with the familiar rule that statutory provisions governing public officials in regard to the time, form and mode of performing their duties, are generally directory and not part of the essence of the act to be performed, as they are inserted simply with a view of securing system, uniformity and dispatch in public business, the words "at the time and in the manner prescribed in section 18," may be properly treated as surplusage and so be disregarded in construing said section 20.

It is true that section 5 of the Itinerant Vendors' Act provides for the exact amount to be paid by each class of itinerant vendors, and that section 8 of the same act provides that "all fees paid to clerks for licenses granted under the provisions of this act shall be for the use of the county in which the license is granted; but these provisions necessarily only refer to the fees prescribed by that particular act itself; nor do any of its other provisions in any way even imply that it was the intention

of the Legislature to exempt itinerant vendors' licenses from the general provisions of section 20 of the Revenue Act of 1902, and, therefore, I am of the opinion that county clerks should be required to collect two dollars and fifty cents additional to the fees prescribed in said Itinerant Vendors' Act for each license issued in accordance with its provisions, and remit the same to the State Treasurer.

Respectfully submitted,

N. C. MILLER,
Attorney General.

By I. B. MELVILLE,
Assistant Attorney General.

PENITENTIARY AND REFORMATORY COMMISSIONERS —MEETINGS.

Meetings may be held each month if necessary, instead of once in three months, and vouchers passed and approved at such monthly meetings are legal.

April 10, 1906.

HON. ALFRED E. BENT,
State Auditor,
Denver, Colorado.

Dear Sir—I am in receipt of your letter of this date, submitting to this office for advice, the following question:

"I have been advised that the Board of Penitentiary and Reformatory Commissioners have, by resolution, decided to meet monthly for the purpose of approving bills for salaries and expenses for their institutions. It has been the policy of the Board in the past to meet quarterly, and I shall be pleased to have you advise me if it will be all right for this office to issue warrants in payment of vouchers issued and approved by this Board at monthly meetings."

In reply I beg to say that the statutory provisions as to the meetings of said commissioners are as follows:

Section 3414, 1 M. A. S., provides, as to meetings of the Penitentiary Commissioners:

"The Board of Commissioners shall meet as often as once in three months."

As to meetings of the Reformatory Commissioners, section 4151, 1 M. A. S., provides:

"The commissioners shall meet at the institution as aften as once in three months, and oftener if proper control and management shall require."

It is a matter of discretion with the commissioners whether they shall met each month, or not oftener than once in three months. If the proper control and management of the institutions require monthly meetings, I think such meetings are legal.

I am, therefore, of the opinion that if the vouchers are otherwise all right, there can be no valid objection to them because they were issued and approved by the Board at a monthly meeting, and, in such case, it would seem to me to be proper to issue warrants thereon.

Yours truly,

N. C. MILLER,
Attorney General.

By W. R. RAMSEY,
Assistant Attorney General.

PHARMACISTS—LAW CONCERNING.

The State Board of Pharmacy should give notice before depriving one of his registration as a pharmacist.

January 4, 1906.

State Board of Pharmacy,
Denver, Colorado.

Gentlemen—An opinion from this office has been requested concerning the application of Joseph I. Faulke for registration as a pharmacist, and a written statement of said applicant in support of his claim that he is entitled to registration has been submitted to me.

The applicant states that under the law of 1887, a certificate of registration was duly issued to him April 2, 1887, and that he paid his annual dues, or fees, up to and for the year ending July 2, 1893.

The law requires the Board to keep a book for the registration, and I presume that the registration book will show whether or not the applicant was duly registered up to and for the year ending July 2, 1893. If it can be so shown, then he was a "Registered Pharmacist" under the provisions of the new law, which was adopted April 7, 1893.

Section 2, chapter 131, of the act of 1893, which is still in force, provides:

"Registered pharmacists shall comprise all persons regularly registered as such in the State of Colorado for the year ending July 2, 1893."

See Session Laws 1893, page 365.

Section 8 of said act provides:

"Every registered pharmacist, and every assistant pharmacist, in the meaning of this act, who desires to continue in the pursuit of pharmacy in this State, shall annually, after the expiration of the first year of registration, and on or before the 2nd day of July of each year, pay to the Secretary of the Board of Pharmacy a renewal fee to be fixed by the Board, but which shall not exceed $2.00, in return for which a renewal of registration shall be issued. If any person shall fail or neglect to procure his annual registration as herein specified, notice of such failure having been made to his post office address as obtained from the books of the Secretary, to the Board may, after the expiration of thirty days following the issue of said notice, deprive him of his registration and all other privileges conferred by this act; in order to regain registration, it shall be necessary for such person to make application and pass examination, as provided for in section 7 of this act."

The applicant does not claim that he has ever paid his annual dues, or renewed his registration under the law of 1893.

If he desired to continue in the pursuit of pharmacy, it was his duty to procure his annual registration as specified in section 8 of said act. He states, however, that in 1893 he went out of the pharmacy business, and secured other employment, but tendered his dues to the Secretary of the Board, who informed him that while not actively engaged in the business of pharmacy it would not be necessary to pay the annual two-dollar assessment or fee, and that when he desired again to engage in the business of pharmacy, he could pay the dues or assessments for the years he was out of the business, and his registration would be renewed; and that acting upon this advice, he did not pay the dues after the year ending July 2, 1893.

The statute does not so provide. On the contrary, it expressly provides:

"If any person shall fail or neglect to procure his annual registration as herein specified, notice of such failure having been mailed to his postoffice address as obtained from the books of the Secretary, the Board may, after the expiration of thirty days following the issue of said notice, deprive him of his registration and all other privileges conferred by this act."

It does not appear that the applicant has ever renewed his registration under the law of 1893, but his name seems to have been dropped from the list of regular pharmacists. When, how, or why, his name was dropped from the registration list, I am not advised. Before a registered pharmacist can be deprived of his

registration on account of failure or neglect to procure his annual registration, the law requires that notice of such failure shall be mailed to his post office address, and then, after the expiration of thirty days following the issue of such notice, he may be deprived of such registration. If it can be shown that the Board complied with the requirements of the statute in this respect, then the applicant is not now entitled to registration, but must pass the examination provided for in section 7 of the act of 1893, in order to regain registration.

However, if he was a registered pharmacist for the year 1893, and the Board has not deprived him of his registration in compliance with the provisions of the aforesaid statute, then, it follows that he must be considered a registered pharmacist within the meaning of the new act.

As to whether or not the statute has been complied with, presents a question of fact which should be determined by the Board upon proper investigation.

When a right has been acquired under the law, and a person has been permitted to engage in the bsuiness of a pharmacist, he can not be deprived of that right unless proper notice is given and the statute is strictly followed.

The Board should keep a registration book in which should be entered the names and places of business of all persons registered under the act of 1893, on what grounds and under which particular section of the act each was registered, and other facts pertaining to the granting of certificates. It should also keep a record of its proceedings, so that it can be determined what action has been taken by the Board in any particular case.

See section 5, Session Laws 1893, page 367.

Respectfully yours,

N. C. MILLER,
Attorney General,

By W. R. RAMSEY,
Assistant Attorney General.

PRINTING.

The printing of the House and Senate Journals is required to be done under the supervision of the Commissioner of Public Printing.

March 18, 1905.

HON. W. A. PLATT,
Commissioner of Public Printing,
State Capitol.

Dear Sir—I have your letter of the 14th inst., relating to the printing of the House and Senate Journals, in which you request an opinion as to the respective jurisdiction of the Secretary of State and the Commissioner of Public Printing in regard to said journals and the printing of same.

By the act of 1903, the office of Commissioner of Public Printing was created, and said officer was given full direction and supervision of all the public printing of the State of Colorado, except as otherwise provided by law. Said act is the latest law upon this subject. The exceptions mentioned therein relate to the printing, publishing and binding of the reports of the decisions of the Supreme Court and Court of Appeals, and printing for certain State institutions.

The Commissioner, under the provisions of said act, is authorized to contract for the printing of the Journals of the Senate and House of Representatives, and the same shall be embraced in printing of the fourth class and shall be let in one contract.

Section 27 of said act provides:

"All the printing, publishing and binding for the State, except for the State institutions, shall be done under the immediate supervision of the Commissioner of Public Printing, and no orders for public printing or binding of any sort shall be given to any contractor by any person or department except the Commissioner of Public Printing."

Section 19, *inter alia,* provides:

"The Commissioner of Public Printing shall carefully scrutinize and measure all work and material furnished under any and all contracts within the purview of all laws affecting printing and binding for the State."

By an act approved March 30, 1899, it was provided that the Secretary of State, after the adjournment of the General Assembly, should have said Journals published and distributed. But, by section 9 of the act of 1903, it is provided, *inter alia,* that

"The daily journal of each house of the General Assembly shall be printed * * * in the same form as that hereinabove required for the calendars of the General Assembly; and the printer's form for each day's journal for each house of the General Assembly shall be held intact until said journal shall have been corrected and approved, when all corrections ordered shall be made by the printer without resetting, except as necessary to the making of such corrections. From such corrected forms, when approved respectively by the Secretary of the Senate and the chief clerk of the House, he shall make up and print two hundred and fifty copies of each of said daily journals in such form and size of page as are herein specified for the House and Senate Journals, and these shall be bound at the end of the session as the official journal of each house, respectively, without cost or expense of resetting or reprinting."

I do not believe it was the intention of the Legislature to require the printer to hold in type the form of the Journal for each day's proceedings until after the close of the session. On the contrary, it seems to me that the provision is clear that when the journals have been corrected and approved, then the printer should make the necessary corrections in the forms which have been set up by him, and that such corrected forms should be approved by the Secretary of the Senate and the chief clerk of the House, and then 250 copies of each of said journals, in proper form and size, should be printed, and, at the end of the session the same should be bound as the *official* journals of each house, respectively, without cost or expense of re-setting or re-printing.

By section 37 of said act, it is made the duty of the Secretary of State to

"furnish to the Commissioner of Public Printing, as soon as practicable, after the adjournment of each session of the General Assembly, a copy of all the laws passed at such session, properly arranged for publication, with a full index and marginal notes to the laws, as fast as the said Commissioner shall require the same, and shall see that the printing and binding of the laws are well executed."

The intention of section 9 was to save to the State the cost and expense of re-setting and re-printing the daily journals of the House and Senate, and I can see no good reason why the forms should be held intact until after the close of the session.

After the Journals have been corrected and approved by each house respectively, and then the corrected forms have been approved by the Secretary of the Senate and the Chief Clerk of the House, I can see no reason for further delay in the printing of said journals, and I think no further delay was intended by said act.

It will be observed that certain provisions of the act of 1899 are in conflict with the act of 1903. However, section 43 of the last mentioned act provides:

"All acts and parts of acts in conflict or inconsistent with the provisions of this act, are hereby repealed."

Trusting that the foregoing fully answers your inquiry, I am,

Yours respectfully,

N. C. MILLER,
Attorney General.

By W. R. RAMSEY,
Assistant Attorney General.

PRINTING.

The printing of the Insurance Department must be done under the supervision and control of the Commissioner of Public Printing.

January 26, 1905.

HON FRANK S. TESCH,
Deputy Superintendent Insurance,
Denver, Colorado.

Dear Sir—I have your letter of the 16th inst., in which you inquire

"whether it is necessary for the printing of the Insurance Department to be done by the State Printer, or whether, under section 2207, Mills' Statutes, this Department can have its printing done where, and as it may seem best."

The act creating the Insurance Department was approved and went into effect February 13, 1883.

Section 2207, M. A. S., provides that the Superintendent

"shall have an office at the State Capitol and shall procure the necessary furniture, safe, fuel, stationery, printing and such other supplies as may be necessary for the transaction of the business of his office * * *."

You have referred also to the latter part of section 2209, M. A. S., concerning the Superintendent's report, which reads:

"Not exceeding one thousand (1,000) copies of such report shall be published, by and subject to the order of such Superintendent, at the expense of the department."

By an act approved April 8, 1889, it is provided that

"All officers required by any law of the State to make reports to the Governor or Legislature shall deposit the same with the Governor on or before the 15th day of November next preceding the regular session of the General Assembly, and it shall be the duty of the Secretary of State to place said reports, without delay, in the hands of the person authorized to do the public printing for publication, and *to superintend the printing of the same, and see that it is done in a proper manner;* of each of the reports of said officers there shall be published five hundred (500) copies for the use of the General Assembly and State officers."

By an act approved April 18, 1891, it is provided in section 1 that:

"From and after the passage of this act, *all public printing for the State of Colorado shall be done by contract and not otherwise,* and the Secretary of State is hereby authorized to advertise for thirty (30) days in two daily papers published in the City of Denver, inviting sealed proposals for doing all printing of bills, memorials, resolutions, roll calls, calendars, cards, committee reports, rules of each house, record and other printed blank books, House and Senate Journals, *reports of State officers,* inspectors and commissioners, ready reference calendars, letter heads, note heads, envelopes, *and all other necessary printing,* and when such proposals shall be opened, it shall be the duty of the Secretary of State to let contracts to the lowest responsible bidders for such items as they may respectively be entitled to by virtue of being the said lowest bidders. Every bidder shall accompany his bid with a guarantee of at least one thousand dollars that he will enter into the contracts for such items as may be awarded him at the prices stated in his bid."

In order to enable the Secretary of State to discharge the duties required of him by said act, it is also provided that he shall appoint a printing clerk who shall be a practical printer.

Section 12 of said act provides that:

"The Secretary of State shall, on the first day of August immediately preceding each biennial session of the General Assembly, advertise for thirty days in two daily papers in the city of Denver, inviting sealed proposals for doing all printing and binding required by the General Assembly, *and by the several State departments,* for the two succeeding years, and such bids shall distinctly specify at what prices, at or below the maximum rates provided for in this act, the bidder will perform the work and furnish the stock."

It is also provided therein that all other acts or parts of acts in conflict with the foregoing "are hereby repealed."

The Superintendent of Insurance is a State officer, required to make an annual report to the Governor concerning the affairs of the Insurance Department, and, while it is true that section 2209 provides that his report shall be published at the expense of

the department, it will be observed that the acts of 1889 and 1891 were passed subsequent to section 2209.

However, if said section had not, expressly, been repealed by the acts just referred to, it seems clear, by reason of still later acts, that it was not the intention of the Legislature that an exception should be made in favor of the Insurance Department.

While section 2207, enacted in 1883, provides that the superintendent shall *procure* printing for his office, this means that he shall do so through the agencies prescribed for that purpose and in the manner provided by law. All of the State departments are authorized to procure printing, but it must be done through the Commissioner of Public Printing.

The act of 1899, page 358, section 1, providing for the payment of the expenses of the Insurance Department, does not necessarily include printing.

Chapter 102, Session Laws of 1895, pages 229-230, section 2, provides that:

"All officers required by any law of the State to make reports to the Legislature, *or the Governor,* shall deposit the same with the Governor on or before the 15th day of November next preceding the session of the General Assembly; and it shall be the duty of the Secretary of State to place said reports, without delay, *in the hands of the person authorized to do the public printing for publication, and to superintend the printing of the same, and to see that it is done in a proper manner.*"

This act also provides that there may be printed and published one thousand (1,000) copies, or less, of each of the reports of all executive State officers, *and of all other reports,* two hundred and fifty (250) copies or less, provided that there shall be five hundred (500) copies of each of the reports of the State Superintendent of Public Instruction and the State Engineer.

I now call your attention especially to the last enactment on this subject, which may be found in chapter 152 of the Session Laws of 1903, pages 386-403, approved April 11, 1903, entitled:

"An act in relation to public printing, providing penalties for violation of the provisions of this act, and repealing all acts and parts of acts in conflict herewith."

Section 1 provides:

"There is hereby created the office of Commissioner of Public Printing, who, except as otherwise provided by law, shall have full direction and supervision of *all public printing of the State of Colorado, and particularly as hereinafter specified.*"

Said commissioner is required to be a practical printer, with a thorough knowledge of all details of all kinds of book and job work, and who has had at least five years of experience therein. He is not permitted to engage in any other occupation or employment, and is required to devote all his time to the duties of his office, and give bond in the sum of $20,000.00 far the faithful per-

formance of all his duties as such commissioner. All public printing is required to be done *by contract and not otherwise*, and by the provisions of said act shall be divided into seven classes. The contracts for each of said classes shall be let separately, as follows, namely:

First: The legislative printing, including bills, memorials, resolutions, etc., shall constitute the first class.

Second: The printing and binding of the reports of the officers and departments of State required by law to be printed, and all other books and pamphlets except as herein specified, shall constitute the second class.

Third: The record books and all other blank books wherein permanent records are to be kept by *any of the departments of* the State government, shall constitute the third class.

Fourth: The journals of the Senate and House of Representatives shall constitute the fourth class.

Fifth: The laws passed by the General Assembly at each session, known as the "Session Laws," shall constitute the fifth class.

Sixth: The ordinary commercial printing, consisting of letter heads, bill heads, note heads, envelopes, circulars and blanks of all sizes and for all purposes, *for the use of all the different departments of the State government,* shall constitute the sixth class.

Seventh: All printing not herein otherwise provided for shall constitute the seventh class.

Said commissioner is required to advertise for proposals to do said printing, and, with the Governor and State Treasurer, is authorized to determine the lowest responsible bidder.

The size, weight and quality of the material used, the kind of type and character of work to be done, and the maximum prices are fully prescribed in said act.

The commissioner is required to carefully scrutinize and measure all work and material furnished under any and all contracts, within the purview of all the laws affecting printing and binding for the State, and shall keep a permanent record of the same in his office.

The duties which, by the act of 1891, devolved upon the Secretary of State and the printing clerk are, by the act of 1903, to be performed by the Commissioner of Printing. Section 27 of this act provides:

"All printing, publishing and binding, for the State, *except for the State institutions,* shall be done under the immediate supervision of the Commissioner of Public Printing, and no orders for public printing or binding of any sort shall be given to any contractor by *any person or department except the Commissioner of Public Printing.*"

The "State institutions" referred to are those wherein express provision is made allowing such institutions to have printing done and paid for out of the appropriations made for such institutions.

Section 23 provides:

"The printing, publishing and binding and material therefor, for the separate public, educational, reformatory and penal institutions of the State shall be done and performed by such institutions severally and paid for out of the appropriations for such institutions respectively."

Section 21 of the same act provides:

"No publishing or binding of any sort or description whatever shall be furnished to any department of the State government or to any officer or employe of the State, except on requisition of the head of such department, *addressed to the Commissioner of Public Printing;* but the provisions of this act shall not apply to the printing, publishing or binding of the reports of the decisions of the Supreme Court and Court of Appeals of the State of Colorado, nor any ordinary printing required for any *State institution,* the printing, binding and publishing of which may be by law authorized to be done outside of the provisions of this act."

Section 43 provides that:

"All acts and parts of acts in conflict, or inconsistent with the provisions of this act are hereby repealed."

In the construction of a statute, the prime object is to ascertain the intention of the Legislature, and such a construction ought to be put upon the statute as may best answer the intent which the makers had in view. That intent is to be collected from the act itself, and other acts *in pari materia,* or upon the same subject matter, and is sometimes collected from the cause or necessity of making the law. The reason of the law—that is to say, the motive which led to the making of it and the object in contemplation at the time—is the most certain clue to lead us to the discovery of its true meaning.

The object of the statute of 1903 was to provide a uniform system and to centralize all public printing into one department under the supervision and control of a practical and experienced printer—a man competent to judge of the quality of material furnished, the prices thereof and the value of the work done.

It is true that certain printing is not embraced within the provisions of said act, but the same has been expressly excepted therefrom, and the reasons given therefor. There is no exception in said act exempting the Insurance Department from the provisions thereof.

It is a general rule of statutory construction that the express mention of one person, thing, or consequence, is tanta-

mount to an express exclusion of all others. See Black on Interpretation of Laws, page 146, section 64.

This rule, however, is subject to conditions and limitations, but it would seem to apply herein. Was it the intention of the Legislature that the Insurance Department should be excluded from the provisions of said act and permitted to have its printing done at the expense of that department? If so, why did it not say so when it was mentioning the printing not included therein?

It is fair to presume that it was the intent to provide such a plan as appeared to be the most economical and beneficial to the State and to secure the most efficient and satisfactory work. What good reason is there for making an exception in favor of the Insurance Department and putting it upon an independent basis in this respect?

My attention has been directed to the phrase "except as otherwise provided by law," contained in section 1. Said act certainly does not contain any provision that in the least makes an exception in behalf of the Insurance Department, and my opinion is that section 2209 was repealed and rendered inoperative in so far as the printing referred to therein is concerned, the number of reports to be published and the payment of the expenses thereof, by the acts of 1889, 1891 and 1895. However, whether or not it was so repealed by said acts, I think it quite evident that it was repealed by the act of 1903.

It is well settled that between two inconsistent and irreconcilable acts or sections, the last in time or position prevails; a later statute repeals an earlier whenever it covers the same subject, and, in general terms, repeals all other laws within its purview.

Ogden vs. Witherspoon, Federal Cases, 10461.

If two grants of power by the Legislature are repugnant, the second must control.

Korah vs. Ottawa, 32 Ill., 121.

Where a statute repeals the laws and parts of laws in conflict with it, a previous act on the same subject, the material provisions of which are repugnant to those of the new act, is repealed, unless the subsequent act shows an intention to keep the previous one in force.

People vs. Grippen, 20 Cal., 677.

Sedgwick on Construction of Statutory Law, page 104, says:

"It is well settled that a subsequent statute, which is clearly repugnant to a prior one, necessarily repeals the former, al-

though it do not do so in terms; and even if the subsequent statute be not repugnant in all its provisions to a prior one, yet if the later statute was clearly intended to prescribe the only rule that should govern in the case provided for, it repeals the original act."

After a careful consideration of the express terms of the Act of 1903, as well as the general tenor and spirit of the law, the reasons therefor, and the intent of the makers thereof, I am of the opinion that, as the law now stands, the printing for the Insurance Department must be done under the supervision and control of the Commissioner of Public Printing.

Respectfully yours,
N. C. MILLER,
Attorney General.

By W. R. RAMSEY,
Assistant Attorney General.

PUBLIC SCHOOLS.

A military reservation does not form part of a school district and residents of the reservation can attend the public schools only with the consent of the board of directors.

November 16, 1906.

MRS. EMMA ERICKSON,
Fort Logan,
Colorado.

Dear Madam—I have your letter of November 16 inquiring if your School District No. 13, county of Arapahoe, is obliged to admit Filipinos to the school.

Your letter is very brief, but I am informed that the Filipinos are domiciled on the military reservation, and are servants to the officers.

The military reservation is not part of the school district. Persons living there do not have the right to vote by reason of such residence; they do not obtain a citizenship in the State; the reservation does not form a part of the school district. One of the conditions which the United States demands is the relinquishment of governmental control over such reservation. It does not contribute in any manner to the support of the school district.

Section 2, Article IX, of the Constitution provides for the establishment and maintenance of public schools throughout the State, wherein all residents of the State between the ages of sixteen and twenty-one years may be educated gratuitously.

Our Legislature provided for the compulsory attendance of children between the ages of six and fourteen.

I presume it will not be seriously contended that the truant officers can compel the attendance of the Filipinos. If they can not be compelled to attend, I presume they have not the right to the use of the schools without the consent of the board.

Mills' Annotated Statutes, section 417.

My conclusion is that the school board of your district is not obliged to admit the Filipinos if it does not desire.

Respectfully yours,

N. C. MILLER,
Attorney General.

PUBLIC SCHOOLS.

When a petition is presented to the county superintendent of schools by persons desiring the formation of a new district, the superintendent has a discretion to allow or disallow the same.

In exercising discretion, proper means should be taken to do so judicially. This would imply giving all persons interested a proper hearing.

November 17, 1905.

TO THE STATE BOARD OF EDUCATION,
State Capitol,
Denver, Colorado.

In the Matter of Appeal from the decision of the County Superintendent of Schools of Jefferson County, in the organization of District No. 47 from a portion of District No. 21.

Mills' Annotated Statutes, section 3991, provides:

"If in the judgment of the county superintendent the school interests of the district affected by the proposed change will be best promoted by such change, he shall direct some one of the petitioners who is a legal voter to notify each elector residing

within the district so to be formed, by personal service, as far as convenient, etc."

It will be observed that this provision of the statute gives to the county superintendent the discretion of deciding whether the school interests of the districts affected by the proposed change will be best promoted by such change. The determination of this question is not jurisdictional, such as the necessity of leaving at least twenty pupils in the old district; also, that the district to be divided must contain more than nine square miles, or have an assessed valuation of more than twenty thousand dollars and forty children of school age. There are jurisdictional requirements in regard to which error on the part of the county superintendent renders his judgment void. But, in deciding whether a proposed change will best promote the interests of the old and new districts, he acts on his own judgment.

In the case before us a petition was presented to the county superintendent of schools and approved, and an election ordered and held, and the proceedings thereunder approved and the result declared by the county superintendent. Within thirty days after the action of the county superintendent in this matter an appeal to the State Board of Education was prayed and allowed. The only question raised on appeal is the abuse of discretion by the county superintendent in ordering the election and approving the boundary lines of the proposed new district.

The action, we must consider, was taken by the county superintendent after deciding that it was for the best interests of the two districts; otherwise, the petition should have been disapproved and no election ordered.

However, it appears in the evidence before the State Board of Education that the county superintendent would not have approved the petition had she understood the condition in which the organization of the new district would leave the old district. It does not appear, however, that she was unaware of this condition at the time she approved the final proceedings and declared the result.

The law allows an appeal from any decision of the county superintendent by a proper party. The jurisdiction of the State Board to hear appeals is almost unlimited, but where a statute places a decision peculiarily within the judgment of the county superintendent, the State Board must accept the determination of such officer, unless it clearly appears that he has greatly abused his discretion. Mere error of judgment would not warrant the Board in substituting its judgment for his.

It would seem from the evidence of the county superintendent that she did not exercise any judgment at all; that she approved the petition as a matter of course, thinking that it was a mere ministerial act. It appears from her testimony that

she exercised no judgment, made no investigation or inquiry into the circumstances at the time she ordered the election or previous thereto, but it does not appear that she acted judiciously at any time in the matter.

This Board is unable to modify the lines of the districts in accordance with what the evidence shows would best subserve the interests of both the old and the new districts and protect the rights of all. The most this Board can do is to reverse the decision for the reason that the evidence shows that the county superintendent ordered the election without any regard to the interests of the two districts. If she so acted, it was certainly a great abuse of discretion. It was utter failure to exercise any discretion at all, and I can not conceive of a greater abuse of power lodged in an officer.

The county superintendent is without authority to modify or change the boundaries of a proposed new district. His authority is limited to approving or disapproving them. The statute in this regard is very faulty. It should require, upon the presentation of a petition for the organization of a new school district out of an old one, that the county superintendent give notice to the officers in some newspaper, and the application should be published in some newspaper of general circulation and a hearing had upon the petition so that the superintendent may be able to wisely determine whether the proposed change would best promote the interests of the two districts. The law fails to make this requirement and leaves it open for the superintendent to determine the question from the best evidence he may obtain in any manner he chooses to procure it.

If the Board is convinced that the county superintendent in this instance did not act upon any judgment of her own in approving the petition and ordering the election, then the Board would be warranted in finding that there was an utter absence of exercise of discretion, and would have the right to reverse her judgment in declaring the new district formed.

I am persuaded, however, in arriving at this conclusion that the Board must be governed by evidence other than that of the county superintendent. It is contrary to precedent to accept the testimony of an officer to impeach his own judgment or to accept the affidavit of a juror to impeach the verdict of the jury. Officers who have finally disposed of a matter have passed it beyond their jurisdiction.

The Board may be convinced from extraneous evidence that the county superintendent acted unwisely and erroneously, but this is not sufficient evidence to justify the Board in deciding that she acted under a gross abuse of discretion. And the fact that 160 pupils are placed in one district of $70,000 less property valuation than the new district contains, should have great weight, especially when only 100 pupils are given to the new district. Add to these facts that no reason is given for placing

certain sections of land in District No. 17 which could not be urged with better argument for placing them in District No. 21, and it seems to me evident that the superintendent did not consider the best interests of these districts.

"The discretion vested in the council can not be exercised arbitrarily, for the gratification of feelings of malevolence, or for the attainment of merely personal and selfish ends. It must be exercised for the public good, and should be controlled by judgment, and not by passion or prejudice. When a discretion is abused, and made to work injustice, it is admissible that it shall be controlled by *mandamus.*"

Village of Glencoe vs. The People, 78 Ill., 383, 389.
State vs. Supervisors, 88 Wis., 356.
Bailey on Jurisdiction, 573, and citations.

I would further recommend that the Board prepare a circular directed to the several county superintendents of the State of Colorado, requesting them, when petitions are presented for the organization of new districts out of old, to give such notice to the residents and school board of the old district and such opportunity to be heard as will enable the superintendent to determine whether the best interests of the two districts will be promoted by the formation of thé new district.

Respectfully submitted,

N. C. MILLER,
Attorney General.

PUBLIC SCHOOLS.

Revocation of a teacher's certificate is a matter between the county superintendent and the teacher, and a right of appeal from his decision does not belong to a patron of the school.

March 31, 1905.

MR. SAMUEL N. WHEELER,
Grand Junction,
Colorado.

Dear Sir—I am in receipt of your letter of March 30th. I am of the opinion that a notice is essential in this case, and notice not having been given, I do not understand how the board can be benefited by an appeal. We want the law settled, but we do not want to take a case in which the board has blundered as a means of obtaining a judicial construction of the law.

Section 16, School Laws of 1903, referring to the county superintendent, provides:

"* * * And he may revoke certificates of any grade, at any time, for immorality, incompetency or other just cause."

Further on, it provides:

"In case a certificate is revoked or refused by the county superintendent, the right of appeal to the State Board of Education shall not be denied to the teacher or applicant if said appeal be taken within thirty days from the date of notice of such revocation or refusal."

Then, referring to sections 82 and 89, inclusive, we find the method of appeal. I am referring to the sections in the pamphlet containing the compilation of the school law.

Section 82 recites:

"Any person aggrieved by any decision or order of the district board of directors, in matter of law or fact, may, within thirty days after the rendition of such decision, or making of such order, appeal therefrom to the county superintendent of the proper county."

This section undoubtedly refers to matters brought before the school board by patrons of the school.

Section 85 provides that:

"The county superintendent shall, within five days after the filing of such affidavit in his office, notify the secretary of the proper district, in writing, of the taking of such appeal, etc."

Section 86:

"After the filing of the transcript aforesaid in his office, he shall notify all persons interested adversely in said case, etc."

Section 88 provides:

"Any person or district board aggrieved by any decision or order of the county superintendent, in matter of law or fact, may, within thirty days after the rendition of such decision or making of such order, appeal therefrom to the State Board of Education, in the same manner as provided in this act for taking appeals from the district board to the county superintendent, as nearly as applicable."

You will notice that these sections are consecutive and are to be construed together. The first provides for a hearing before the board; then an appeal may go to the county superintendent; then any person who is aggrieved may appeal from the dceision of the county superintendent, but my judgment is that that refers to the same parties who take the appeal to the county superintendent.

I am inclined to agree with Judge Carpenter in one part of his opinion—that the matter of revoking a teacher's certificate is a matter between the county superintendent and the teacher; otherwise, it lies in the power of every patron of a dis-

trict school to harass the teachers of the district by appeals to the State Board of Education.

I have no objection to this cause being argued on writ of error before the Supreme Court, but of course, the failure to give notice is fatal.

Yours very truly,
N. C. MILLER,
Attorney General.

PUBLIC SCHOOLS.

The question of voting bonds for a county high school in counties of the fourth and fifth class should be submitted by the county high school committee, and not by the board of county commissioners.

Building should be located at county seat unless otherwise determined by vote of electors.

February 17, 1906.

HON. D. E. NEWCOMB,
County Attorney,
Saguache, Colorado.

Dear Sir—I am in receipt of your favor of the 12th inst. in regard to a ruling of the State Superintendent's Office on the question of county high schools in districts of the fourth and fifth classes, and in reply will say that after reading the ruling referred to, I see no reason for disputing its correctness.

3 M. A. S. (Rev.), 4003a, provides that in order to organize a county of the fourth or fifth class into one school district for high school purposes, a petition signed by fifty taxpayers resident therein, must be presented to the board of county commissioners.

This provision seems to be necessary for the reason that there is no person or body in existence to whom this petition can be presented at such time; but after the question has once been sub mitted to the people, and they have decided as provided in said section, by a majority vote, that such county shall be organized into a school district, then section 4003a further provides that the county superintendent shall call a meeting of the board of directors of the districts of such county; and at such meeting the directors shall, by ballot, choose a committee of four which shall be known as the high school committee; and further provides that the county superintendent of schools shall be ex-officio a member of such committee and the secretary thereof.

The county high school district then has a body to govern its affairs, and the following sections, 4003c and 4003d, provide for filling vacancies and for the times of meeting. Section 4003e

provides that such committee *shall exercise all the powers and perform all the duties* that are at the time of the adoption of this act, accorded to and required of the directors of first and second class districts throughout the State.

I see no reason for limiting the plain provisions of this latter section, and, if not limited, then this committee has the same powers in regard to submitting the question of voting bonds for school buildings as boards of the first and second class districts, and the procedure in this regard is governed by 2 M. A. S., 4057, including the limitation upon the bonded indebtedness to be incurred.

It is true, as you state, that the above section provides that the amount of tax certified to the county commissioners for the maintenance of the high school shall, in no case, exceed two mills on the dollar of the assessed valuation of the county; but I am of the opinion that this refers only to the support of the high school, and not to the question of the bonds voted for a building, as a similar provision will be found referring to school districts of all classes, and still such provision has never been construed as limiting the bonds voted for buildings.

In regard to the manner of determining the amount of the bonds to be submitted to the electors, I would suggest that the provisions of the law would be complied with by having the high school committee first determine the amount of bonds necessary to erect the building, and then submit this question to the electors at the time of voting "For the Bonds" or "Against the Bonds;" and in this manner the electors would determine by a majority vote the amount of the bonds as well as the question of whether or not they shall be issued.

As to the location of the county high school building, I am of the opinion that in the absence of determining a location other than the county seat by the electors, such building should be erected at the county seat.

It necessarily follows, that, if the above is a correct interpretation of the law, the levy made by the board of county commissioners for the purpose of building an addition to the court house could not be used for the purpose of building a county high school.

Respectfully submitted,

N. C. MILLER,
Attorney General.

By I. B. MELVILLE,
Assistant Attorney General.

PUBLIC SCHOOLS.

Petitioners from portions of two districts should not include land in a third district in which no persons reside.

May 16, 1906.

EMMA G. MEYERS,
Superintendent of Schools,
Delta, Colorado.

Dear Madam—I have your letter of May 14 inquiring concerning the formation of a new school district from parts of three old ones.

Your letter states that the petitioners live in Districts Nos. 18 and 11, but they include in the petition a part of District No. 9, which is contiguous to the portions of 18 and 11, asking to be set off as a new district. The part of District No. 9 asked for includes a railroad siding, but there is no one living on this strip of No. 9. You say that District No. 9 will object to giving up two and a half miles of railroad included in the petition. Your inquiry is directed to the point as to whether petitioners for a new district, taking in parts of Nos. 18 and 11, can include a part of District No. 9 on which there are no residents.

The law in relation to the organization of new districts from portions of old districts is found in the School Laws of 1905 (Annotated), section 85. I direct your attention to the following provision of that section:

"If in the judgment of the county superintendent, the school interests of the districts affected by the proposed change will be best promoted by said change, he shall direct some one of the petitioners who is a legal voter to notify each elector residing in said districts so to be formed by personal service as far as convenient, and to post a notice in three public places in said new district, that such petition has been made, and that a meeting will be held, naming the time and place for such meeting, to determine the question of the proposed organization."

Your attention is specially called to the first portion of this section, which leaves it to your judgment if the school district ought to be formed. You are therefore invested with a large discretion.

In order to form a wise judgment in the premises, a circular letter was issued some time ago by the State Board of Education, requesting superintendents to give all persons a hearing before arriving at a decision. This would include the patrons of District No. 9 as well as the persons included in the petition for

the new district and the old districts 11 and 18 not included. I think the school boards are the proper ones to be notified.

As to the power of petitioners from Districts Nos 11 and 18 to cut off a portion of District No. 9, in which there are no residents, I am not certain as to the construction of the statute. My judgment, however, is that the portion of District No. 9 on which no one lives can not be included in the proposed new district. It is not possible for any school patron of District No. 9 to vote on the question, because no one lives on it, and it is clear that everybody in Districts Nos. 11 and 18 entering the new district, would vote to cut off the portion of District No. 9 included, unless they possessed patriotism beyond the ordinary voters, and thus an irreparable injury might be done to District No. 9.

I can conceive of small villages where almost the entire property supporting the schools is outside of the settlement, and under the plan proposed, the district could be shorn of nearly all of its taxable property.

I think that the statute does not mean that petitioners have the right to invade the property of other districts, when the residents do not join in the organization of the new district.

Yours respectfully,

N. C. MILLER,
Attorney General.

PUBLIC SCHOOLS.

In districts of the first class the board may discharge a principal for cause after giving him an opportunity to be heard, even though a written contract has been entered into for a definite period.

June 22, 1906.

MR. M. E. LEWIS,
Secretary District No. 2, Public Schools,
Florence, Colo.

Dear Sir—Some years ago your district employed a principal of the high school, and he was re-employed from year to year continuously, until February 13, 1906, when the board dismissed him for alleged cause.

Some time about September, 1905, it came to the knowledge of the board that the principal had resigned from a similar position in Iowa, on account of immorality, and acting upon this rumor, the board gave him a leave of absence until September 30, when he was permitted to re-enter upon the work, because of in-

sufficient showing as to the truth of the rumor. On February 13, the board took the following action:

"Whereas, Mrs. Lee Champion and F. A. Moore, duly qualified and acting members of the Board of Education of School District No. 2, of Florence, Fremont county, Colo., have ascertained by personal investigation, that the charges made that M. E. Shuck was compelled to resign as the principal of the Thurman school of Thurman, Fremont county, Iowa, on account of gross immorality with one of his young lady pupils were true and based on actual fact, and

"Whereas, The said M. E. Shuck secured employment as principal of the Florence high school by falsehood and misrepresentation, and has so continued to hold his position; and,

"Whereas, The whole moral tone and educational efficiency thereof has been and is being impaired by the retention and continued employment of the said M. E. Shuck; therefore, be it

"Resolved, By the Board of Education of School District No. 2, of Florence, Fremont county, Colo., in regular session assembled, that the certificate heretofore granted to the said M. E. Shuck by the above named board of education be and the same is hereby immediately revoked and the secretary is hereby instructed to notify the said M. E. Shuck and Professor Alf Dunfo, superintendent of the Florence city schools, of this action of the board of education."

This action of the board was taken without notice to Mr. Shuck.

I am asked for an opinion as to whether Mr. M. E. Shuck can recover his salary for the remainder of the year, amounting to $300.00, and was shown a written contract signed by Mr. Shuck and the president of the board.

Said school district No. 2 is of the first class, and the certificate held by Mr. Shuck was granted by the board and was revoked by the board and the action reported to the county superintendent.

Several propositions are presented, which I will state as follows:

1. Can a license to teach be revoked without notice, containing a specific statement of the charge and an opportunity be given to be heard?

2. Can the board, under its authority to dismiss a teacher for good cause, do so without a hearing?

3. What is the effect of the written contract signed by the principal and the president of the board?

First. Section 24 of the School Law provides that the county superintendent may revoke certificates of any grade at any time for immorality, incompetency or other just cause.

The power to revoke certificates is granted to the county superintendent, and the county superintendent, of course, has a supervision over all the schools. I take it that the revocation can only be made by this officer. The law makes no provision for the board revoking the certificate granted by itself. However, the board, having the right to dismiss for good cause, attains the same object.

Second. The right to dismiss the principal without a hearing is dependent upon the interpretation to be given the contract of employment. The written instrument presented to me for examination was signed by the principal and by the president of the board. This is not sufficient to make a contract binding upon the school district, unless the board of directors at a regular meeting, or a special meeting legally called, authorized the employment of a teacher for a year. If from the minutes of such a meeting there can be reasonably gathered an expression on the part of the board authorizing the employment of Mr. Shuck for the school year 1905-1906, the memorandum signed by him and the president is binding upon the district. Moreover, if the minutes of such a meeting show that the board appointed him as the principal for that year, and he went to work with that understanding, the district is also bound for the entire period.

From this simple statement you will be able to determine if a contract exists for the full school year.

Third. Did the board proceed legally on February 13, 1906, in dismissing Mr. Shuck?

It appears from the proceedings exhibited that no notice was furnished him of the charges, and no opportunity was afforded him to refute the charges, and the board acted upon the reported investigation of what Mr. Shuck had once done in Iowa. The board also dismissed him for the reason that the schools at Florence had become demoralized through learning of the nature of the charges in Iowa, and the consequent discussion of it. I do not mean to say that the demoralized condition of these schools is a sufficient ground for the discharge of a principal, if on baseless rumors a panicky condition arises for which the principal is not responsible. There must be some reason and justice, or else the people of the school district are the ones to blame. If the principal was guilty of the alleged charge made against him in Iowa, this is sufficient evidence of his unfitness to serve as principal, and the board would be warranted in dismissing him.

The contract between Mr. Shuck and the school district is in the nature of a property right and can not be set aside where due process of law has not been observed. Due process of law requires that a person shall have notice of charges and an opportunity to be heard.

The action of the school district in Iowa is not a basis for the action of the school district in Colorado without a hearing as to

the validity and verity of the same. Even judgments of a court are subject to impeachment in sister states, and an opportunity to the opposing party must be given to contest its validity and verity.

Under the law of Colorado, the school board is made the jury as to the sufficiency of the evidence for dismissal. The cause, however, must be such as amounts to a legal ground for the setting aside of a contract. As to the sufficiency of the cause, a court has jurisdiction, because a contract right is involved. For instance, a court would hold that drunkenness, incompetency or immorality are sufficient causes.

If a merchant employs a clerk and he is discharged because of drunkenness, incompetency or dishonesty, the clerk has a right to take the matter into court, if he holds a contract of employment for a given period of time. The court will hear evidence and determine, through the aid of a jury, if the alleged cause for dismissal exists. But the school law of Colorado invests the board with the power to determine the existence of the cause. The law is silent as to the procedure or method which the board shall follow in reaching the conclusion. In the absence of such statute, we must look to the common law, because the contract is made with reference to existing statutes, and the common law not in conflict with statutes. A contract is in the nature of a property right. Its existence can not be impaired by one party rescinding it without the consent of the other, except for sufficient cause, and this cause can not be arrived at arbitrarily. A hearing of both sides of a controversy is necessary to arrive at a just conclusion concerning any charge. When the law provides that a teacher may be dismissed for sufficient cause, and invests the board with the power of determining the existence of the cause, it means that the board shall proceed in accordance with well recognized principles of justice in reaching a conclusion. The common law has always required that, before a valuable right can be taken away from a person, he shall be afforded an opportunity to he heard.

The right to dismiss an officer for cause has been decided by our Supreme Court to require the Governor, who is the judge, to afford the incumbent a chance to be heard. If this simple rule is followed, the Governor may then draw the most erroneous conclusion and dismiss him, and his action will be upheld, because the law invests the Governor with the power to decide.

I have gone into this matter fully and satisfied myself that the action of the board in dismissing this principal was illegal, and that he is entitled to his pay for the three months mentioned.

First: I am satisfied that legal grounds for his dismissal existed, if sustained by evidence produced at a hearing.

Second: His dismissal was illegal because of failure to give him a hearing and serve him with a copy of the charge, specifically stating the charge.

Third: A certificate to teach school can not be revoked without a hearing. Ex parte Wall, 107 U. S., 265, 289.

In my opinion he is entitled to the pay for the remainder of the school year.

Respectfully submitted,
N. C. MILLER,
Atorney General.

PUBLIC SCHOOLS.

The office of county superintendent of schools is established by our Constitution and can not be abolished unless by constitutional amendment. When no election is held at the proper time, or the superintendent elect fails to qualify, the incumbent holds until his successor is duly qualified.

September 7, 1906.

MR. GEORGE ROBERTSON,
Saguache, Colo.

Dear Sir—I am in receipt of your letter of the 4th inst., submitting to me the following questions:

1. If there was no successor elected to the office of county superintendent of schools, would the present incumbent hold indefinitely? Provided this is answered affirmatively, then,

2. What action is necessary to abolish the office?

3. If an incumbent should refuse to engage in the active discharge of the requirements of the said office, though not accepting pay therefor, could he be compelled to perform such services?

In answer to said questions, I will say:

First. The law provides for the election of a county superintendent of schools next November, whose term of office would begin the first Tuesday in January, 1907. However, if there should be no election for that office, or if the superintendent-elect should fail to qualify, then, under our Constitution, the present incumbent would hold the office until his successor was duly qualified. See article XII, section 1, Colo. Const.; section 920, 1 M. A. S., page 788.

Second. The office of county superintendent of schools is established by our Constitution, and can not be abolished unless by constitutional amendment.

Third. Article XII, section 8, of our Constitution requires every civil officer, except members of the General Assembly, and such inferior officers as may be by law exempted, before he enters upon the duties of his office, to take and subscribe to an oath to

faithfully perform the duties of the office upon which he is about to enter.

It is also provided by the Constitution that "No person shall hold any office or employment of trust or profit under the laws of the State, or any ordinance of any municipality therein, without devoting his personal attention to the duties of the same."

Article XII, section 2, Colo. Const.

The statute provides as follows:

"Every person elected or appointed to any office, or to any and every position of trust and employment under the laws of this State, or under any ordinance of any municipality in this State, who shall violate his oath of office, or fail and neglect to perform the duties of his office as prescribed by law or ordinance, shall, upon conviction thereof, upon indictment or information, be fined in a sum not less than ten dollars nor more than three hundred dollars for each and every offense; and the court shall direct that the defendant shall be confined in the common jail of the county until such fine, together with the costs of prosecution, be paid, not to exceed thirty days, or until he shall have been discharged by due process of law."

See Session Laws 1895, section 1, page 228.

Trusting that the foregoing fully covers your inquiry, I am,

Respectfully yours,

N. C. MILLER,
Attorney General.

By W. R. RAMSEY,
Assistant Attorney General.

PUBLICATION OF LEGAL NOTICES.

The meaning of the phrase, "Newspaper of general circulation," as used in statutes requiring the publication of legal notices and advertisements.

September 6, 1906.

THE COLORADO SPRINGS GAZETTE,
Colorado Springs, Colo.

Gentlemen—In answer to your letter relating to the publication of legal advertisements, I beg to call your attention to the statute regulating the same and requiring, among other things, that legal notices, advertisements and publications of any kind

necessary to be published in a newspaper shall be published in "a newspaper printed in whole or in part, and published in the county in which said notice or advertisement is required to be printed, having a general circulation therein." See Session Laws 1897, pages 177-178, section 1.

The law also provides that the publisher of any such notice, advertisement, etc., shall in addition to the other matters required to be set forth therein by law, state that the newspaper in which said notice, advertisement, or publication shall have been made, has been established for the length of time required, and is a newspaper within the meaning of the act. See Session Laws 1897, pages 177-178, section 2.

The statute does not designate that the publication shall be made either in a daily or weekly paper, nor does it require that it shall be a paper having the largest number of subscribers, or the widest circulation, but the same must be made in *a newspaper* having a *general circulation* in the county where said notice is required to be published.

It, therefore, becomes necessary to consider what constitutes "a newspaper," and what is meant by "a general circulation," as used in the statute.

Newspapers are of many varieties. They may be religious, commercial, temperance, legal, scientific or political newspapers. It would be difficult to give a complete definition that would include and describe all kinds of newspapers.

There is some conflict of authority as to just what constitutes a *newspaper,* as the term is used in the statutes requiring the publication of legal notices.

1. What is the generally accepted meaning of the term "newspaper?"

A general definition given and approved by many authorities is as follows:

"According to the usage of the business world, and in ordinary understanding, a newspaper is a publication, usually in sheet form, intended for general circulation, and published regularly at short intervals, containing the intelligence of current events and news of general interest."

See

Beecher vs. Stevens, 25 Minn., 146.
Hull vs. King, 38 Minn., 349.
Abbott's Law Dic., title "Newspaper."
4 Opinions Attorneys General U. S., page 10.

See, also,

Kerr vs. Hill, 75 Ill., 51.
Kellogg vs. Carrico, 47 Mo., 157.

In the case of *Hanscom vs. Meyer,* 83 Am. St. Rep., 509 (Nebraska case), the court said:

"It is difficult, if not impossible, to determine with clearness and exactness where the line of demarcation should be drawn between a newspaper in a legal and common acceptation of the term, and the numerous publications devoted to some special purpose, which circulate among a certain class of the people, and which are not within the purview of statutes requiring publication of legal notices in some newspaper. The daily and weekly newspapers, common to all parts of the country, of general circulation among the people, without regard to class, vocation or calling, devoted to the gathering and dissemination of news of current events of interest to all, and usually espousing and advocating principles of some political party with persistency, if not at all times with consistency, are, without doubt, newspapers in the meaning of the statute. On the contrary, many publications, such as literary, scientific, religious, medical and legal journals, are obviously for but one class of the people—and that class always but a small part of the entire public, are not newspapers within the legal and ordinary meaning of the word, and it would be manifestly unjust, as well as against the letter and spirit of the law, to recognize such publications as proper for the advertisement of legal notices, the object, in all cases, being to give wide and general publicity regarding the subject of which notice is required to be published."

In the case of Pentzel vs. Squire, 161 Ill., 346, it was held that the *Chicago Law Journal Weekly* is a secular newspaper of general circulation, although published but once a week, and having an average circulation, weekly, of 3,875 copies among lawyers and laymen; that besides the reports or decisions of courts of record and courts of review and a digest of cases, it contains news of a general nature and current events of importance to the public.

In the case of Williams vs. Colwell, 43 N. Y. Supp., 220, *The Daily Mercantile Review,* although devoted principally to market reports, financial and mercantile items, local court proceedings, etc., also containing several columns of news matter of general interest and advertisements of all kinds, was held to be a newspaper within the meaning of the New York statute requiring the publication of notices.

So *The Chicago Daily Law Bulletin* was held to be a secular newspaper of general circulation. See

Railton vs. Lauder, 26 Ill. App., 655; affirmed in 126 Ill., 219.

It has also been held in Illinois that the *National Corporation Rporter,* a weekly publication, containing advertisements

and reading matter mainly, but not exclusively, relating to law and finance of interest to corporations, was a *newspaper*.

Maass vs. Hess, 41 Ill. App., 282.

See, also, on the same subject:

Lynch vs. Durgee, 101 Mich., 171.

However, on the contrary, it was held in the case of *In re Charter Application,* 11 Phila., 200, that the *Legal Intelligencer* is not "a newspaper of general circulation," for the reason that its circulation is mainly, if not entirely, confined to the legal profession, and that it made no difference how large a subscription list the paper had.

In the case of Crowell vs. Parker, 22 R. I., 51, it was held that the *Real Estate Register and Rental Guide* was not a public newspaper, because it was devoted principally to real estate matters, and not intended to be read by the public generally, and of general circulation; and in Beecher vs. Stephens, 23 Minn., 146, the *Northwestern Reporter* was held not to be a newspaper because devoted to the interests of the legal profession.

With the exception of the three cases last referred to, the decisions generally tend to the inclusion of special trade, commercial, religious or scientific journals within the designation of "newspapers."

A well considered case on this subject may also be found in Hall vs. City of Milwaukee, 91 N. W. Rep., page 998.

2. As to the meaning of "a general circulation," I beg to refer you to the case of Puget Sound Publishing Co. vs. Times Printing Co., 33 Wash., 551, where it was held that the *Daily Bulletin* was a newspaper of general circulation within the meaning of the city charter of Seattle. In this case it was held that a paper having from 750 to 1,000 subscribers in the city of Seattle, and read by about 3,000 persons, is a paper of general circulation.

In Lynn vs. Allen, 33 L. R. A., 779, the *Daily Reporter,* published in Indianapolis, having a circulation in the city of Indianapolis of about 550 copies, and of about 2,500 copies outside of the city throughout the state, was held to be a newspaper of general circulation.

By a "newspaper of general circulation" the legislature certainly did not intend a newspaper read by all the people of the county. Webster says that the word "general" means *extensive*, though not *universal*. The usual meaning is "common to many."

In Bell vs. County Commissioners, 1 Lack. Legal Notes, 114, it is held that the term "general circulation" means only a general newspaper as distinguished from one of a special or limited character.

Some authorities hold that general circulation means a circulation that is confined to no particular class, but is general among different classes.

In the case of Bourke vs. Somers et al., 92 N. W., 990, it is held that in the absence of a showing to the contrary, the affidavit of the publisher that the newspaper is one of general circulation in the county is sufficient.

The general rule is contained in the foregoing decisions. Of course, much depends upon the facts of each particular case, and these questions must be determined by the courts. Our Supreme Court has not construed the statute. As to whether or not the particular paper you refer to in your letter comes within the meaning of our statute, I am unable to say without further information concerning the facts. Besides, any opinion rendered by me would be unofficial.

Trusting, however, that the foregoing will be sufficient to cover your inquiry, I am,

Respectfully yours,
N. C. MILLER,
Attorney General.

By W. R. RAMSEY,
Assistant Attorney General.

REGISTER OF THE STATE BOARD OF LAND COMMISSIONERS—SALARY CAN NOT BE INCREASED DURING TERM OF OFFICE.

The Register of the State Board of Land Commissioners is a public officer, and under our Constitution his salary can not be increased after his appointment.

July 29, 1905.

HON. ALFRED E. BENT,
Auditor of State,
State Capitol.

Dear Sir—I have your communication in which you request advice from this office as to whether the present Register of the State Land Board is entitled to the increase of salary provided by section 5, chapter 134, Laws 1905, approved April 12th, A. D. 1905.

As I understand the facts, the present incumbent was duly appointed by the State Land Board on the 1st day of February, A. D. 1905, for the term of two years, commencing March 1st,

1905, and ending March 1st, 1907, subject, however, to removal at any time by the Board of Land Commissioners. He accepted said appointment, executed bond, took the oath of office and entered upon the discharge of his duties.

The law in force at that time provided that the salary of the Register shall be two thousand dollars per annum.

By an act of the Fifteenth General Assembly, approved April 12, A. D. 1905, relating to the State Board of Land Commissioners and certain officers created thereby, it was provided that the salary of the Register shall be three thousand dollars per annum.

The question presented is, shall the said Register be paid the salary of two thusand dollars per annum, which was allowed him by law at the time he was appointed, or shall he be paid three thousand dollars per annum, the salary attached to the position since his appointment?

The general rule is that, in the absence of any constitutional restriction, the salary of a public officer may, by proper legislative authority, be either increased or diminished during his official term.

It is a common provision in the Constitutions and statutes of the states that the salary or compensation of a public officer shall not be increased or diminished during his term. The wisdom of this provision is obvious, and the courts decline to permit it to be evaded. Mechem on Public Officers, section 858.

The Constitution of Colorado provides:

"Except as otherwise provided by this Constitution, no law shall extend the term of any public officer, or increase or diminish his salary or emoluments after his election or appointment."

Article V, section 30, Colo. Const.

The decision of this question must turn upon the proper construction to be given to the foregoing provision of the Constitution. Is the Register of the State Board of Land Commissioners a "public officer" within the meaning of said provision?

Mechem on Public Officers, section 1, gives the following definition:

"A public office is the right, authority and duty created and conferred by law, by which, for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised for the benefit of the public. The individual so invested is a public officer."

This definition is supported by an abundant weight of authority.

Another definition is:

"A public officer is an individual who has been appointed or elected in the manner prescribed by law, who has a designation or title given to him by law, and who exercises the functions concerning the public assigned to him by law."

23 Am. & Eng. Enc. Law (2nd Ed.), page 322.

Bradford vs. Justices, 33 Ga., 332.

Pope vs. James, 68 Ga., 128.

Massenburg vs. Bibb Co., 96 Ga., 614.

N. Bennington F. N. B. vs. Mt. Tabor, 52 Vt., 87.

There are numerous criteria which are not, in themselves, conclusive, yet which aid in determining whether a person is an officer and whether his employment is an office.

In the case of Throop vs. Langdon, 40 Mich., 673, that eminent author, Judge Cooley, said:

"The officer is distinguished from the employe in the greater importance, dignity and independence of his position, in being required to take an official oath, and, perhaps, to give an official bond, in the liability to be called to account as a public offender for misfeasance or non-feasance in office, and usually, though not necessarily, in the tenure of his position. In particular cases other distinctions will appear which are not general."

The position of Register is created and the duties thereof are defined by statute, and a salary is affixed thereto. The Register was appointed for a definite term, subject, however, to removal; he is given an official designation, or title, by statute; he is required to give bond to the State in the sum of fifty thousand dollars for the faithful discharge of his duties, which bond must be approved by the Land Board and filed with the Secretary of State; he is provided by the State with an office, office furniture, stationery, etc., and is required to make a biennial report to the Governor such as is required by law to be made by certain other officials and which must be transmitted to the General Assembly.

After careful consideration of this matter, I have reached the conclusion that the position of Register of the Land Board of this State is an office, and that the individual appointed to, and filling said position, is a public officer.

As the act providing for the increase of salary was not passed until more than two months after the appointment of the present Register, I am of the opinion that the foregoing constitutional provision applies, and that, inasmuch as the Constitution has not provided for such increase of salary, the said act can not give it.

In the case of Carlile vs. Henderson, 17 Colo. 536-537, our Supreme Court, in referring to the proper construction of

article V, section 30, of our Constitution, in an opinion delivered by Judge Elliott, used the following language:

"Nothing in the line of partisan or personal legislation could be more mischievous than that the General Assembly should have the power, at the opening of the legislative session, to rush through acts increasing or diminishing the salaries of those just elected to executive offices. The temptation to thus reward favorites, punish opponents, or make bids for executive favors, would be as great before such officers elect had qualified as afterwards. That it was the object of the Constitution makers to prevent such evils, can not be doubted. Mechem on Public Officers, section 385, et seq.; also 858; Cooley's Const. Lim., 334; State ex rel. Haight vs. Love, 39 N. J. L., 14; also 476; People ex rel. Seeley vs. May, 9 Colo., 80; State vs. Hudson Co., 44 N. J. L., 388."

That case related to an elective officer. The salary of the State Treasurer was increased by statute during his official term. The same rule applies, however, to a public officer who has been appointed.

It has been held that although the increase was made only two days after the commencement of the officer's term, he is not entitled to it.

Weeks vs. Texarkana, 50 Ark., 81.

I do not hold that the act increasing the salary of the Register is unconstitutional, for it will apply during the next term, but advise you that inasmuch as the said act was passed after the present incumbent was appointed Register, the Constitution prevents said act from changing his salary from the sum at which it was fixed at the time of his appointment.

Yours very truly,
N. C. MILLER,
Attorney General.

By W. R. RAMSEY,
Assistant Attorney General.

REGISTRATION LAW.

The registration law of 1905 refers only to voting precincts wholly or partially within the limits of cities or municipalities of more than 5,000 inhabitants. Judges of election outside of such precincts are appointed as heretofore by the board of county commissioners.

June 4, 1906.

MR. E. E. HUBBELL,
County Attorney,
Pueblo, Colorado.

Dear Sir—In reply to your written request of the 31st ult. for an opinion from this office construing paragraph 2, section 3, of the registration law of 1905 (Session Laws 1905, page 190), and particularly with reference to the power of the county clerk to appoint *registration committees* and *judges of election* for precincts wholly without the limits of cities or municipalities with a greater population than five thousand inhabitants, I beg to advise you as follows:

Paragraph 2, above referred to, reads:

"The registration committee shall consist of three qualified electors in each precinct, who shall be appointed by the county clerk for each of the precincts in the county on the first Tuesday in July, A. D. 1906, and upon the same day every two years thereafter in the manner herein provided, and he shall make and file in his office a list of each and all persons so appointed therein, the names, business, postoffice and residence addresses and precinct and ward of each person so appointed."

This paragraph must be construed in connection with paragraph 1 of the same section, which reads:

"The registration of electors in each of the several precincts in said cities shall be made by a committeee, to be called the 'registration committee,' in each of said precincts as herein provided. The registration committee shall also be the judges of election at any general or special election next following their appointment and during their term of office."

The provisions of these two paragraphs must also be construed in connection with, and limited by, the terms of the title of the act, and the title of the act reads:

"An act concerning elections in all counties and municipali- within this state, whether created by direct constitutional provision or pursuant to statutory enactment, and to provide for the appointment of a registration committee and judges of election, and the registration of all qualified electors in election pre-

cincts included wholly or partially within the limits of cities or municipalities with a greater population than five thousand inhabitants, and to provide for punishing all violations thereof, and to repeal all acts and parts of acts inconsistent therewith."

It may be true that because a comma follows the word "elections" in the fifth line of the title as above quoted, that the presumption might be indulged in that the intention of the Legislature was to provide for the appointment of a *registration committee* and *judges of election* in all election precincts of the State; and this presumption is doubtless strengthened by the wording of paragraph 2 of section 3, above quoted, that "the registration committee shall consist of three qualified electors in each precinct, who shall be appointed by the county clerk for each *of the precincts in the county* on the first Tuesday in July, A. D. 1906, and upon the same day every two years thereafter *in the manner herein provided,* * * *."

The *"registration committee"* spoken of in paragraph 2, *supra,* is defined in paragraph 1, *supra,* and limited by its provisions to the precincts wholly or partially within "said cities;" and in this same paragraph, and in no other portion of that act, "the registration committee" is made the "judges of election" during their term of office, so that if it should be held that the county clerk has the authority to appoint "the registration committee" referred to in paragraph 2, *supra,* still such committee would have no power to act as judges of election, and in precincts wholly outside of cities with a greater population than five thousand inhabitants, we would have a "registration committee" appointed by the county clerk, and this committee would have no power to act as judges of election. The latter would be appointed by the board of county commissioners in accordance with the former law, and this would make the appointment of "judges of election" and "registration committees" so complicated that no court would so interpret the intention of the Legislature.

That this construction was not intended by the Legislature is, we think, conclusively shown by the fact that nowhere else in the entire act is any reference made to the appointment of a *registration committee* or *judges of election* "in precincts wholly without the limits of cities or municipalities of a greater population than five thousand inhabitants," so that the words *"in the manner herein provided,"* as above quoted from paragraph 2, would be absolutely meaningless.

Paragraph 3 of this same section provides that the county chairmen of the two political parties casting the highest number of votes for Governor at the last general election shall certify to the county clerk the names of three qualified electors *in each of the precincts in such city or city and county* * * * etc.," but nowhere is there any provision made in the entire act for furnishing the names of a "registration committee" or "judges of election" to the county clerk for appointment in precincts wholly

without the limits of cities or municipalities with a greater population than five thousand inhabitants, and it is scarcely reasonable to presume that the Legislature would place so important a prerogative in the hands of one person, as the appointment, without any supervisory or reviewing power, of *registration committees* and *judges of election* in all the precincts of four-fifths of the counties of the State.

Again, section 1 (Session Laws 1905, page 188) provides that no person shall be permitted to vote at any general or special election *held in any election precinct included wholly or partially within the limits of any city with a greater population than five thousand inhabitants, without first having been registered, etc., in the manner and form provided in such act;* but nowhere in the act is there any provision prohibiting persons in outside precincts from voting without complying with the terms of the act; nor, in fact, are there any provisions in said act defining the manner of registration or even the duties of such registrars, in addition to the fact above mentioned that no provision is made for the appointment of election judges in such outside precincts, so that if the appointment of a *registration committee* by the county clerk under such authority should be admitted, it would be but an empty honor for such appointees, and with absolutely no prescribed duties to perform.

Still, again, section 25 of the act (Session Laws 1905, page 219) reads:

"All acts and parts of acts inconsistent with the provisions of this act, as well as all penalties thereunder, are hereby repealed; Provided, Nothing herein shall be construed as a repeal of any act concerning registration and its application to elections in election precincts not included within the limits of cities of the classes and population mentioned in section 1 of this act."

It will be admitted that the former laws amply provided for the appointment of "election judges" by the board of county commissioners of the respective counties, and that such judges should act as a "registration board" in certain precincts, and the county clerk should perform the registration in others; and the law also provided for the manner and form of such registration in all election precincts; since the above section of the act of 1903 provides that nothing therein shall be construed as a *repeal of any act concerning registration and its application to elections in election precincts not included within the limits of cities of the classes and population mentioned in section 1*, to wit, more than five thousand inhabitants, it is very evident that the former laws in regard to registration in precincts not included wholly or partially in such cities, are still in force and effect, and that the boards of county commissioners of the respective counties of the State still have the authority to

appoint the "judges of election" in such outside precincts, who, as formerly, shall sit as a "board of registration."

Respectfully submitted,

N. C. MILLER,
Attorney General.

By I. B. MELVILLE,
Assistant Attorney General.

REGISTRATION.

Married women should be registered by their Christian names and not by the initials of the husband.

October 23, 1906.

HON. D. E. NEWCOMB,
La Jara, Colorado.

Dear Sir—I have your letter making inquiry concerning the registration of voters in towns or places containing less than twenty-five hundred inhabitants.

The law governing the registration of such voters is found in M. A. S., at page 1086, and is known as the "Rural Registration Law."

It provides that the lists shall contain the names of the qualified electors, alphabetically arranged according to surnames, so as to show in one column the name of the elector in full length and in another the place of his residence, or if on land, the government survey: otherwise such description as will locate his residence. The important part of the law requires them to be registered according to surname.

However, if, after the vote has been cast, it appears that the registration has been made only with the use of initials, it has been decided that if the voter was a bona fide elector, it is not a ground for the rejection of the ballot.

I have no doubt that the vote of a wife registered in the name of her husband, as, for instance, "Mrs. D. E. Newcomb," cannot be rejected after the ballot has been received; because, if as a matter of fact, she was a qualified and lawful elector, no fraud has been done and in the absence of fraud, there is no ground for contest or rejection of the ballot.

But I am not so sure that a challenge against such person for improper registration might not be good. I am not passing positively on this question.

It has been held that "Mrs." is not part of a wife's name; it merely designates her as a married woman. It is equally certain that the initials of her husband are not her surname; therefore, the legal registration of the wife should be in her own name, as, for instance, "Rebecca L. Elberson."

I think, to make the matter clear and beyond dispute, judges of election should register all women according to their Christian names, and not according to their husbands' names. I have no doubt in my own mind as to the correctness of this proposition.

However, I am equally certain that if they once vote, the ballot cannot be rejected on account of the mistake, if they are otherwise qualified as electors.

I might call attention to State vs. Richards, 42 N. J. L., 69; Schmidt vs. Thomas, 33 Ill. App. Ct., 109.

Yours respectfully,
N. C. MILLER,
Attorney General.

SECRETARY OF BOARD OF HORTICULTURE.

Secretary of State Board of Horticulture entitled to mileage when traveling in the discharge of the duties of the office.

June 4, 1905.

HON. ALFRED E. BENT,
Auditor of State,
Capitol Building.

Dear Sir—I am in receipt of your communication, setting forth that Mrs. Martha A .Shute, Secretary of State Board of Horticulture, has presented a voucher to your office for mileage due her as secretary of said board while traveling, I presume, in the discharge of her official duties, and asking if she is entitled to such compensation.

Section 4 of the act creating the State Board of Horticulture, Session Laws of 1897, page 60, provides that:

" * * * The secretary shall receive a salary of one thousand dollars ($1,000) and mileage at the rate of five (5) cents per mile for every mile necessarily traveled in the proper discharge of official duties * * *."

The language of this section is perfectly clear and unambiguous, and as I am unable to find any law in conflict with its provisions, I can see no reason why you should refuse to honor this voucher; provided, of course, that the mileage was earned

by her while neccessarily traveling in the proper discharge of the official duties of said office.

Respectfully,

N. C. MILLER,
Attorney General.

By I. B. MELVILLE,
Assistant Attorney General.

STATE AUDITOR.

Compilation of statutes governing the disbursement of moneys by the several boards and State institutions.

February 9, 1905.

HON. A. E. BENT,
Auditor of State,
Denver, Colorado.

Dear Sir—In reply to your letter of January 25, 1905, making inquiry concerning the auditing of warrants drawn by the various boards and State institutions, I beg leave to report as follows:

Girls' Industrial School:

3 Mills' (Rev.), 2200-a1—2200-b1.

Mute and Blind School:

2 M. A. S., 3251, 3252, 3258, 3259.

Normal School:

2 M. A. S., 4131; 3 Mills' (Rev.), 4134-c.

School of Mines:

2 M. A. S., 4083.

State University:

2 M. A. S., 4593, 4600.
2 M. A. S., 4612 (Regents' mileage, etc.).

Boys' Industrial School:

1 M. A. S., 2170.

Agricultural College:

1 M. A. S., 41, 61, 74, 76, 85, 86, 93.
3 Mills' (Rev.), 384-c; Gen'l Appr. Bill each year.

Soldiers' and Sailors' Home:

3 Mills' (Rev.), 4108-c, 4108-k.

Reformatory:

2 M. A. S., 4140, 4164-5; 4172-3.

Penitentiary:

2 M. A. S., 3426, 3431, 3437, 3442, 3443, 3444, 3471.
3 Mills' (Rev.), 3409.

Insane Asylum:

2 M. A. S., 2971.

Dependent Childrens' Home:

3 Mills' (Rev.), 422-v.
3 Mills' (Rev.), 422-c.

Bureau of Mines:

3 Mills' (Rev.), 3215, 3216.

Board of Law Examiners:

See General Appropriation Bill each year.

Board of Health:

3 Mills' (Rev.), 3546-a, 3546-d (inc.), and Appr. Bill, 1903, page 93.

Board of Charities and Corrections:

3 Mills' (Rev., 384-c; Gen'l Appr. Bill each year.

Board of Pardons:

3 Mills' (Rev.), 1506-e, and Gen'l Appr. Bill each year.

Bureau of Protection:

See Appr. Bill for this purpose, Session Laws 1903, page 94, section 3.

Capitol Building Appropriations:

See appropriations for this purpose, Session Laws 1903, page 96.

Dairy Commissioner:

3 Mills' (Rev.), 8-b, and Gen'l Appr. Bill.

Fish and Game Department:

3 Mills' (Rev.), 2054.

Horticultural Board:

3 Mills' (Rev.), 2142-a, 2145, 2145-a.

Historical and Natural History Society:

See Gen'l Appr. Bill, Session Laws 1903, page 62.

Stock Inspection Board:

3 Mills' (Rev.), 4233-b, 4233-c, 4233-d, 4233-e, 4233-f.

Board of Medical Examiners:

2 M. A. S., 3559.

I desire to call your especial attention to the general powers of the Auditor, as found in the chapter concerning the executive department, and in this regard I would say that it is your duty, whenever it is discovered, to reject any claim which for reasons within your knowledge, is fraudulent or objectionable. This is what the office of State Auditor is constituted for.

I also desire to call your attention to section 3535, M. A. S., and would advise that if these papers are not in your possession, they should be called for. All these leases, so far as they concern the various boards, should be accompanied with the approval of the board.

I believe this covers all you ask for in your letter.

A reference to the statute cited in each case will make plain your duty concerning the disbursement of moneys under the special funds.

Yours very truly,

N. C. MILLER,
Attorney General.

STATE BOARD OF HORTICULTURE.

The procedure to be followed by a county horticultural inspector against persons owning or being in charge of orchards infested with insects, pests or their eggs.

February 27, 1906.

MRS. MARTHA A. SHUTE, Secretary,
State Board of Horticulture,
State Capitol, Denver, Colorado.

Dear Madam—I am in receipt of your favor of the 27th inst., enclosing a letter addressed to you from Mr. J. F. Myser, Horticultural Inspector for Garfield county, Colorado, in which an opinion is requested from this office as to what action can be taken by a county horticultural inspector against parties living within his county who refuse to spray their fruit trees, and in reply I beg to advise you:

Section 1, Chapter 102, of the Sessions Laws of 1899 (3 Mills' Revised, 2146-g), amended section 7, chapter 55, of the Session Laws of 1897, which provided the procedure to be followed by the county horticultural inspector in cases of this kind.

The above law, now in force, provides, in brief, that whenever a county horticultural inspector shall find any orchard, nursery or trees infested with insects or pests or diseases injurious to fruit, fruit trees, vines, bushes or any other horticultural interests, he shall serve a notice upon such owner or person in charge that such a state of affairs exists, and shall give such person a formula for the treatment thereof, whereupon the latter shall proced to destroy such insects, or pests, or their eggs or larvae.

In case such owner or person in charge, after having been notified as above provided, shall fail, neglect or refuse, within a reasonable length of time, to use such formula or to destroy such insects, pests or their eggs or larvae, he shall be deemed guilty of maintaining a public nuisance, and shall be punished by fine in a sum not less than five dollars nor more than one hundred dollars; and after conviction in any county or district court, such orchard, nursery or trees shall be adjudged a public nuisance, and shall be punished by fine in a sum not less than five dollars nor more than one hundred dollars; and after conviction in any county or district court, such orchard, nursery or trees shall be adjudged a public nuisance, and the court, in its judgment, shall order the said inspector to abate such nuisance,

and the expenses thus accrued shall be taxed up as costs against the defendant.

Respectfully submitted,

N. C. MILLER,
Attorney General

By I. B. MELVILLE,
Assistant Attorney General.

STATE BOARD OF HORTICULTURE.

Secretary of State Board of Horticulture can be also a member, and if so, can draw per diem as member in addition to her pay as secretary.

December 15, 1905.

MRS. MARTHA A. SHUTE,
Secretary State Board of Horticulture,
State Capitol, Denver, Colorado.

Dear Madam—I have your letter of November 29th, reading as follows:

"If consistent, will you render your opinion to the writer, if the Secretary of the State Board of Horticulture is entitled to per diem, being a member of said board?"

The compensation of members and the secretary of the board is fixed by section 2142-a, 3 Mills (Rev.):

"The secretary shall receive a salary of one thousand dollars and mileage, at the rate of five cents per mile for every mile necessarily traveled in the proper discharge of official duties, and the members of the board shall receive three dollars per day for each day actually in the performance of their duties, and actual traveling expenses necessarily incurred in the discharge of their official duties; Provided, That said members of the board shall not receive pay for more than thirty days in any one year."

The board may elect a secretary who is not a member, and if such is the course of action, one thousand dollars is paid to a secretary, and ninety dollars is paid to a member of the board. On the other hand, if a member of the board is made secretary, the two compensations may go to the one person, for there is nothing inconsistent with a person being a member of the board and secretary.

Our law allows a person to hold two offices when the same are not conflicting. Now, if you draw pay as a member of the board when rendering service as such, I do not think it is objec-

tionable because your compensation as secretary covers all you do except when the board is in session.

Therefore, my conclusion is that when you are inspecting your district, as do other members of the board their districts, you may draw $3.00 a day when performing duty as a member of the board, not to exceed thirty days in one year.

Yours respectfully,

N. C. MILLER,
Attorney General.

STATE CANAL NO. 3.

Tools belonging to the Board of Control of State Canal No. 3 should not be included in the transfer required to be made by the State to the United States government under the Act of the General Assembly, approved March 16, 1903.

September 7, 1905.

HON. JESSE F. McDONALD,
Governor of Colorado,
State Capitol.

Sir—I have your communication requesting an opinion as to whether certain tools, worth about $200.00, belonging to the Board of Control of State Canal No. 3, are included in the transfer to be made by the State to the United States government, under the act of the General Assembly, approved March 16, 1903, and enclosing therewith certain correspondence relating to the same.

By section 1 of said act, the State of Colorado "* * * releases and relinquishes to the United States of America all of its right, title and interest in and to State Canal No. 3, and all rights and privileges acquired in connection therewith."

However, it is further provided as follows:

"The Board of Control of said State Canal No. 3 is hereby directed, upon the acceptance by the United States government, through such lawful means as said government shall determine, of the benefits of this act, and by its taking over the said canal, to release, relinquish and convey to the said United States government, or to such body or board as may be created by the congress of the United States to take over and complete said canal, all rights, title, claim and interest of the State of Colorado and of said Board of Control of State Canal No. 3, in and to the said canal and tunnel, and all rights, privileges and authority in connection therewith, and to do any and all things necessary and

proper to fully and completely turn over to the United States government, or to any body or board so created by it, the property, rights and privileges herein referred to, such release, relinquishment and conveyance to be made without cost to the United States government; all to the end that the United States government may have full and complete authority to construct, maintain, operate and dispose of said canal, and any and all water and rights in connection therewith."

See Session Laws 1903, pages 292-293.

It will be observed that said act requires the conveyance of the property mentioned therein by the Board of Control to the United States, which, I understand, has not yet been made.

I am of the opinion that the tools referred to are not included within the terms of said act, nor was it contemplated by said enactment that said tools should be a part of the property to be transferred to the United States.

I herewith respectfully return said correspondence.

Respectfully yours,
N. C. MILLER,
Attorney General.

By W. R. RAMSEY,
Assistant Attorney General.

Enclosures.

STATE ENGINEER'S DEPARTMENT.

SYLLABUS.

3 Mills (Rev.), 2447i, requires that the certified copy of priorities and tabulated statement of decrees shall be kept and preserved in the State Engineer's office.

The salary of the division engineer should be paid for time actually engaged in the discharge of his duties. The sum of $500 is the total amount of reimbursement allowed a division engineer for expenses necessarily incurred.

Being in readiness and prepared to discharge the duties of the office entitles the division engineer to pay only for the period of time between the day the first water commissioner is called out and the day the last one is needed.

April 28, 1905.

HON. T. W. JAYCOX,
State Engineer,
Denver, Colorado.

Dear Sir—I am in receipt of your favor of the 27th inst., asking for an opinion from this office in regard to the interpretation of the following sections of the statutes:

First—"Should the certified copies of all decrees of District Courts establishing priorities of water rights within that district (as referred to in 1 M. A. S., 2453) be sent to the office of the State Engineer? If so, does section 2447i, 3 Mills' (Rev.), require the Irrigation Division Engineer to also file these certified copies with the State Engineer, or does it allow him to retain them in his own office?"

Section 2453, *supra,* required the Superintendent of Irrigation, who, under the later law, has been succeeded by the Irrigation Division Engineer, to prepare a book, entitled, "The Register of Priorities of Appropriation of Water Rights for Water Division No. ...., State of Colorado," in which register it was his duty to enter and preserve the certified copies of the decrees of District Courts in regard to priorities of water rights, furnished him by the clerks of said courts, and to file such register in the office of the State Engineer. In addition, it was his duty to make from this register "a tabulated statement of all the ditches, canals and reservoirs in his division, whose priorities have been decreed, which statement shall contain the following information concerning each ditch, canal and reservoir, arranged in separate columns, etc." As there is no provision in

this statute requiring him to file this "tabulated statement" or a copy thereof with the state engineer, it must be presumed that the register thus prepared should be kept in the office of the Superintendent of Irrigation.

Section 2447i, *supra,* provides that:

"The clerk of any court establishing judicial decrees fixing the priorities of appropriation of water for irrigation, or other beneficial purposes, in any of such divisions, shall furnish the Irrigation Division Engineer having jurisdiction, with certified copies thereof, as heretofore provided by law in the case of superintendents of irrigation, whereupon such engineer shall make a tabulated statement of such decrees in a book prepared for that purpose, and shall forward a copy thereof to the State Engineer, and keep and preserve in his office the certified copy."

It will be observed from the section last quoted that the only difference between the duties of the Irrigation Division Engineer and the duties of the Superintendent of Irrigation is the preparation and transmittal of a copy of the "tabulated statement" of such decrees to the state engineer, but that in all other particulars the duties of the Irigation Division Engineer are the same, including the sending of the certified copy received from the clerk of the district court to the State Engineer, to be kept and preserved in the office of the latter.

Second—"Is the monthly salary of the Irrigation Division Engineer, as provided by 3 Mills' (Rev.), section 2447e, to be paid for the entire twelve months of the year, regardless of the duties performed, or is it to be paid only for the time necessarily and actually employed in the discharge of his official duties?"

Section 2447e, *supra,* provides that:

"Each Irrigation Division Engineer shall receive the sum of one hundred and twenty-five dollars ($125) per month for the time acutally employed in the discharge of his duties, payable monthly upon vouchers approved by the State Engineer, drawn upon the Auditor of State, by whom a warrant shall be drawn upon the State Treasurer therefor."

Section 2447g, 3 Mills' (Rev.), provides:

"The duties of the Irrigation Division Engineer shall be as follows: *He shall be governed by all acts heretofore enacted relative to superintendents of irrigation* and shall have general control over the water commissioners of the several districts within his division."

The time during which the Superintendent of Irrigation was employed was fixed by section 2451, 1 M. A. S., as follows:

"Said Superintendent of Irrigation shall commence the discharge of his duties in his division as soon as the first water commissioner in any district within his division shall be called out, and shall continue to discharge his duties until the last water commissioner in any district of his division ceases to be needed.

* * * The Superintendent of Irrigation shall receive as compensation * * * for every day during which he is employed in the discharge of his duty."

The law of 1903, 3 Mills' (Rev.), as above quoted, does not require any additional or different duties to be performed by the Irrigation Division Engineer than were formerly performed by the Superintendent of Irrigation; nor does the later law repeal section 2451, *supra* except in so far as the latter is in conflict with the former. So that it necessarily follows that the Irrigation Division Engineer should receive one hundred and twenty-five dollars per month only "for the time actually employed in the discharge of his duties"—such duties to be performed within the time prescribed by section 2451, *supra*. Provided, however, that if the additional duties which may be required of him by the State Engineer, in accordance with section 2447g, are necessary to be performed at other times than as above provided, then such Irrigation Division Engineer should be paid for such extra services at the rate of one hundred and twenty-five dollars per month.

Third—"Is the amount of five hundred dollars, allowed for expenses, to be considered as a total reimbursement for all necessary expenses incurred in the performance of his duties?"

Each Irrigation Division Engineer, in accepting the appointment under the statute, obligates himself to perform the duties of his office, and to insure such performance upon his part, the State requires a bond in the sum of five thousand dollars.

The performance of his duties undoubtedly means the performance of *all* the duties connected with his office; and in compensation for these services, he is to receive the sum of one hundred and twenty-five dollars per month for the time actually employed in the discharge of such duties, and, in addition thereto, "he shall also receive reimbursement for all necessary expenses, evidenced by vouchers, incurred in the performance of his duties, which expenses shall not exceed the sum of five hundred dollars per annum, etc."

I take it that this last clause means that he shall be reimbursed to the extent of five hundred dollars per annum for all necessary expenses incurred in the performance of his duties, and that the balance of such expenses, if any, shall be paid by him personally.

Fourth—Is being in readiness and prepared to perform the duties of the office such service as should be paid for by the state?

In determining this question, both section 2447e, *supra*, and section 2451, *supra*, should be considered—that is, the former section provides that the Irrigation Division Engineer shall receive the sum of $125 per month for the time actually employed by him in the discharge of his duties, while the latter section

states that his duties shall commence as soon as the first water commissioner within his division shall be called out, and that he shall continue to discharge his duties until the last water commissioner in any district of his division ceases to be needed.

Therefore, the logical conclusion to be deducted therefrom would be, that as the Irrigation Division Engineer must be prepared and in readiness to perform his duties during this period of time, he should be entitled to pay for the entire time included in the period commencing with the date upon which the first water commissioner in his district is called out, and ending with the date when the last water commissioner in his district is needed, regardless of whether he performs any actual labor during this time or not, if he is at his post of duty and prepared and in readiness to perform the duties of his office.

Respectfully submitted,

N. C. MILLER,
Attorney General.

By I. B. MELVILLE,
Assistant Attorney General.

STATE GEOLOGIST—APPOINTMENT—TERM OF OFFICE.

The position of State Geologist is a civil office. The appointment is made by the Governor, by and with the advice and consent of the Senate, for the term of two years. May hold office until successor is qualified.

June 16, 1906.

HON. JESSE F. McDONALD,
Governor of Colorado,
State Capitol.

Dear Sir—In compliance with your request for an opinion concerning the tenure or office of the State Geologist, I beg to say that the statute creating and establishing the office of State Geologist is as follows, viz.:

"The Governor of the State is hereby authorized and empowered to appoint, by and with the advice and consent of the Senate, a State Geologist, who shall be commissioned by the Governor, reside in the State, and hold his office for the term of two years from the date of his appointment."

1 Mills' Ann. Statutes, section 1860, pages 1155, 1156.

Subsequent sections provide that said Geologist shall report the result of his surveys and observations, made under and by

virtue of his said commission, to the Governor, to be submitted to the General Assembly, and no compensation for services nor for expenses shall be paid by the State to him.

1 M. A. S., section 1861, 1862.

I understand that there never has been but one appointment made to said office since the enactment of said statute.

According to section 1860 there is no provision authorizing said Geologist to hold his office for a longer time than two years from the date of his appointment. However, the Constitution of Colorado provides:

"Every person holding any civil office under the State, or any municipality therein, shall, unless removed according to law, exercise the duties of such office until his successor is duly qualified; but this shall not apply to members of the General Assembly, nor to the members of any board or assembly, two or more of whom are elected at the same time; the General Assembly may by law provide for suspending any officer in his functions, pending impeachment or prosecution for misconduct in office."

Article XII, section 1, Colorado Constitution.

If, therefore, said position is a civil office, said appointee could hold the same after the expiration of his term of two years until his successor shall be duly qualified.

Mr. Mechem, in his work on Public Officers, section 24, at page 10, defines a "civil officer" as follows:

"Any officer who holds his appointment under the government, whether his duties are executive or judicial, in the highest or the lowest department of the government, with the exception of officers of the army or navy, is a civil officer."

Another definition given is:

"A public officer is an individual who has been appointed or elected in the manner prescribed by law, who has a designation or title given to him by law, and who exercises the functions concerning the public assigned to him by law."

23 Am. and Eng. Enc. of Law (2nd Ed.), page 322.

Again, it is said that a public office is an agency for the State, and the person whose duty it is to perform this agency is a public officer.

I am therefore of the opinion that the position of State Geologist, provided for in section 1860, is a civil office. The appointment is made by the Governor, by and with the advice and consent of the Senate. Certain duties are prescribed, but no salary or fees are annexed to the office. It may be called an *honorary* office, and accepted for the public good. Under the con-

stitutional provision the appointee can hold until his successor is qualified.

The term of the present incumbent, fixed by the statute, having expired, he now holds over under the constitutional provision. I know of no reason why you can not appoint his successor at any time you may so desire.

Trusting that the foregoing fully covers the points upon which you desire advice, I am,

Respectfull yours,

N. C. MILLER,
Attorney General.

By W. R. RAMSEY,
Assistant Attorney General.

STATE HOME FOR DEPENDENT CHILDREN.

Children can not be committed to home without legal proceedings. Court may select suitable person, with consent of county commissioners, other than sheriff's officer, to take child to home.

December 4, 1905.

MR. WILLIAM WATSON,
Sheriff of Gunnison County,
Gunnison, Colorado.

Dear Sir—I am in receipt of your favor of the 26th inst, asking an opinion from this office as to whether the county court can, with the consent of one of the parents, commit a child to the State Home without a hearing, and, whether, after commitment, the county court or the board of county commissioners can appoint some suitable person, other than the sheriff or his deputies, to take such child to the Home.

In reply to the first question, section 3 of the Juvenile Act, Session Laws 1903, page 180, provides that all proceedings under such act shall be by information or sworn complaint, but section 7 of the same act, page 182, further provides that when any child sixteen years of age or under is arrested with or without a warrant, upon complaint sworn out before a justice of the peace or police magistrate, it shall be the duty of such courts to transfer the case to the county court, and in any such case the latter court may proceed to hear and dispose of the case in the same manner as if such child had been brought before the court upon information originally filed, except that in cases where the de-

linquency charged would otherwise constitute a felony, the court may direct such child to be kept in proper custody until an information may be filed as in other cases, under such act or the laws of the State.

While it is better practice in all cases to file a complaint and information upon which to base the proceeding, so that the records of the court may be complete, still the section last above referred to implies that in certain cases the court may proceed to hear the case without a complaint or information being first filed; but in no case does the law imply that a child can be committed to the Home without a hearing. On the contrary, it is mandatory that a hearing be held, and the records of the court must so show.

This provision is not only for the protection of the child and the parents, but for the protection of the State as well, in that the State should not be burdened with the care and custody of all children, but only those coming within the provisions of this act; and in order to ascertain this fact, a hearing must be had.

In reply to the second question, section 12 of this act, page 186, provides that such act shall be liberally construed, to the end that the care, custody and discipline of the child shall approximate, as nearly as may be, that which should be given by its parents; and that, so far as practicable, such child shall be treated, not as a criminal, but as one needing aid, encouragement, help and assistance.

This section construed in connection with section 9 of the act, page 184, which vests the court with power to commit the child to the care and custody of any person or home suitable for giving the proper care and attention to such child, as contemplated by this act.

I am of the opinion, therefore, that sufficient authority is vested in the court to select, with the consent of the board of county commissioners, some suitable person, other than those connected with your office, to take such child to the State Home.

Yours truly,

N. C. MILLER,
Attorney General.

By I. B. MELVILLE,
Assistant Attorney General.

STATE LANDS.

Is a well an improvement on State land for which compensation should be made?

April 27, 1905.

HON. MARK G. WOODRUFF,
Register, State Board of Land Commissioners,
Denver, Colorado.

Dear Sir—In reply to your request for an opinion from this office in the matter of the appraisement of the improvements on lots one (1) to six (6), inclusive, in block thirty-one (31) of the State addition to the townsite of Littleton, incidental to the application to purchase said land by W. G. Alexander, I beg to submit the following:

It appears from the records of your office that, upon the application to purchase this tract of land, Mr. Thomas A. Curry, an appraiser from your office, was sent to ascertain the value thereof, together with the value of the improvements made thereon by certain lessees. In his report, among the valuations of other improvements, he appraised the value of an artesian well at two hundred dollars.

The property was duly advertised and sold to the said W. G. Alexander, and the required per cent. of the purchase price was paid, but the purchaser now protests against the payment of the appraised value of the artesian well, claiming that the appraiser had been deceived as to the value thereof for the reason that the well had long ceased to flow, and, as the opening is covered, and not apparent from the surface, the appraiser must have obtained his information from some other source—in this instance from the lessee—who willfully misrepresented the value of said well; and the purchaser further contends that said well is of no practical value to the land at this time.

Section 3640, Mills' Annotated Statutes, provides:

" * * * If any land be sold on which surface improvements have been made by a lessee, said improvements shall be appraised under the direction of the State Board. When lands upon which improvements have been made as above, are sold, the purchaser, if other than the owner of said improvements, shall pay the appraised value of said improvements to the owner thereof, taking a receipt therefor, and he shall deposit said receipt with the State Board before he shall be entitled to a patent or a certificate of purchase."

"Surface improvements," as used in the above section, refers to such improvements as would add to the value of the property for the purposes for which it was purchased and could be used.

Whatever sums have been expended experimentally without increasing the value of the land or being of benefit thereto would not be considered surface improvements within the meaning of this statute, for which the purchaser should pay; and in this case, although the lessee might have expended a considerable sum for the drilling of this artesian well, still, if the well is not flowing at this time and is of no material benefit to the land for the uses for which the land is suitable and was purchased, then the purchaser should not be required to pay anything to the lessee for such well.

On the other hand, even if this well has now ceased to flow, if by sinking to a further depth it could be caused to do so, then such sums as were expended by the lessee might be considered to be of benefit to such property and he should receive a reasonable compensation therefor.

However, this question is one of fact, which, it appears to me, it would be proper for your office to ascertain through further investigation by the appraiser, and I would recommend that such action be taken by you.

Respectfully submitted,

N. C. MILLER,
Attorney General.

By I. B. MELVILLE,
Assistant Attorney General.

STATE LANDS.

If lessee refuses to fix price on improvements on State land, it is the duty of the State Board of Land Commissioners to direct an appraisement.

In the sale of land, lessee is given preference.

It is the policy of the board to protect the interest of lessee if it can be done without damage to the State.

December 20, 1905.

HON. MARK G. WOODRUFF, Register,
State Board of Land Commissioners,
Denver, Colorado.

Dear Sir—I am in receipt of your communication of December 19th, stating that the board had ordered eighty acres of land

to be sold to A. J. Anderson, and that the lessee of the land will neither fix a price upon his improvements nor consent to an appraisement by this department. You ask for advice under the circumstances.

It is not necessary for the lessee to consent to an appraisement. If he refuses to fix a price upon the improvements, it is the duty of the State Board of Land Commissioners to direct an aprpaisement to be made.

Section 3640, Mills' Annotated Statutes, provides:

"If any land be sold on which surface improvements have been made by a lessee, said improvements shall be appraised under the direction of the State board. When lands on which improvements have been made as above are sold, the purchaser, if other than the owner of said improvements, shall pay the appraised value of said improvements to the owner thereof, taking a receipt therefor, and he shall deposit such receipt with the State board before he shall be entitled to a patent or certificate of purchase. All such receipts shall be filed and preserved in the office of the State Board of Land Commissioners."

In People vs. Tynon, 2 Colo. App., 131, it was decided that this provision of the statute was for the protection of the lessee and is not a condition precedent to the exercise of the power to sell land.

Sections 3630-c and 3636, volume 3, Mills' Revised Statutes, provide that lands leased are subject to sale at the end of any period of five years covered by the lease. Of course, the lands are subject to sale at the expiration of the lease, and the lessee's privilege to renew the lease is subject to this power of the board to make sale. The lands must be advertised before they can be sold, and the lessee has an equal chance with any one else to com pete for them.

Section 3640, Mills' Annotated Statutes, provides:

"The State Board of Land Commissioners may at any time direct the sale of any state lands, except as provided in sections twelve and thirteen of this act, in such parcels *to actual settlers only,* or *to persons who shall improve the same,* as they shall deem for the best interest of the State and the *promotion of the settlement thereof.* All sales under this act shall be advertised, etc."

"Sales shall be made to citizens of the United States, or to those who have declared their intention to become such."

The purpose of advertising the sale is to secure the highest price for the land. The effect of this, in some cases, is to sell the land to another than the actual settler. It is therefore not neces sary for a person who desires to purchase land to be an acutal settler or to have made improvements upon the land at the time he bids at this public sale.

Section 3647, Mills' Annotated Statutes, provides:

"That all lands sold under the provisions of this act, or any interest therein, shall be exempt from taxation for and during the period of time in which the title to said land is vested in the State of Colorado, and in case any land sold under the provisions of this act, shall not, within one year after date of sale, be actually settled upon, or in good faith improved, according to the spirit of this act, such land shall revert to the state, and the purchaser shall be entitled to repayment of any purchase money, deducting the amount required to pay the lease on such land for the time held by purchase at the same rate as provided for leasing school lands he may have paid on the same."

The construction of this act, in connection with section 3640, above, indicates that the purchaser must become an actual settler, or improve the land in good faith, according to the spirit of our laws concerning state lands, and that if he fails to do so, his title shall revert to the State. It is evident, therefore, that a person may become the purchaser of land without actual settlement or making actual improvements at the time of purchase.

The policy of the State Land Board has always been to sell the land to the lessee, unless some good reason can be given for action to the contrary, subject, of course, to the highest bid at public auction, as provided.

It should be carefully ascertained whether the actual settler upon this land has had every opportunity to bid for the same, and if he has failed to give as much for the land as his brother, it is not the fault of the State Land Board. If there is any misstep taken in this direction, I believe he can remedy it by an action at law. So you should be careful to see that the legal requirements have been observed. If the brother should go into court, for instance, and show that A. J. Anderson did not intend to make valuable improvements or settle upon this land, I think probably he could cancel the sale.

The laws of Colorado provide for the sale of State lands to actual settlers or persons who make valuable improvements thereon. Another statute provides that in case of failure to make actual settlement or improvements according to the spirit of our laws, for a period of one year, the land shall revert to the state and the party shall receive back the money paid to the state.

The provision of our law requiring sale at public auction is to secure the highest price to the state. Where this is done fairly and honestly, the lessee, if not the highest bidder, must turn over the land to the highest bidder.

The provision of the law furnishing a mode of valuation of improvements placed on the land by the lessee is for the benefit of the tenant, and failure of the latter to accept the price will not prevent the State from making the sale. This has been decided by the Court of Appeals. But the person receiving a certificate

of purchase is remanded to his remedy at law to secure possession of the land, and he is there furnished an adequate remedy.

Where a person purchases State land and makes valuable improvements and gives a mortgage upon them, and makes default in payments due the State, the State has a right to take possession of the land and the improvements, but it is the duty of the State, if the mortgagee will keep up the payments and protect his security, to allow him to do so; for any other course would prevent purchasers from securing money for the purpose of making improvements upon the lands.

So far as your letter advises me, there is no irregularity of this kind; and the board may make an order fixing the value of the improvements, upon the report of the appraiser being returned to it. This is for the protection of the brother, and it then remains for A. J. Anderson to take such steps as he may deem advisable to secure the land. He must tender the price of the improvements, and that price must be fixed legally before the tender is any good.

Respectfully submitted,

N. C. MILLER,
Attorney General.

STATE LANDS.

Construction of statute making provision for the payment of the expenses of appraisers for the State Land Board.

APPROPRIATIONS.

July 13, 1905.

HON. A. E. BENT,
Auditor of State,
Denver, Colorado.

Dear Sir—I am in receipt of your communication of July 13th, making the following inquiry:

"Section 10, page 323, Session Laws 1905, providing for the appointment of appraisers of State land, and fixing the amount of their salary, furthermore provides that: 'There shall also be appropriated the sum of three thousand dollars ($3,000) per annum for the purpose of defraying the expenses of said appraisers while visiting the different portions of the State in the discharge of their duties.'

"I shall be pleased to have you advise me if we shall consider this act equivalent to an appropriation and issue warrants against it for the expenses of these appraisers."

Section 10, page 323 of the Laws of 1905, reads as follows:

"There shall be appointed by the State Board of Land Commissioners, not less than three appraisers of State lands, who shall be under the direction of the Register of the State Board of Land Commissioners, and who shall be paid not more than fifteen hundred dollars per annum for such services. There shall also be appropriated the sum of three thousand dollars per annum for the purpose of defraying the expenses of said appraisers when visiting the different portions of the State in the discharge of their duties."

A similar inquiry has received consideration by the Supreme Court of our State in *In re Continuing Appropriations,* 18 *Colo.,* 192. The court, in passing upon the question, confirms the right of the legislature to make continuing appropriations, and points out that such statutes last beyond the biennial period for which the Legislature sits. Such appropriations are subject to repeal and modification by suitable legislation of a later General Assembly, but until repealed or amended they are to be given full force and effect.

I desire to call attention, also, to the opinion of the Hon. David M. Campbell, at page 233 of his Biennial Report for 1899 and 1900. I make the following quotation from this opinion:

"Continuing appropriations do not differ from the specific appropriations made by the General Assembly at its biennial sessions, except that the General Assembly, by the use of apt words in making the continuing appropriations, relieves itself from the necessity of re-enacting the statutes and making specific appropriations for specific purposes at each biennial session."

It seems to me that the language of section 10, Session Laws of 1905, page 323, is clear in designating the sum of three thousand dollars per annum for the purpose of defraying the expenses of these appraisers. If the vouchers drawn against this fund show that the amounts stated are for expenses, you will be justified in honoring the vouchers and drawing warrants for payment of the same.

Yours very truly,

N. C. MILLER,
Attorney General.

STATE LANDS.

A discussion of cash fund provided for by fees in the State Land Board and the right to pay the same into the treasury and draw warrants against it.

January 13, 1905.

HON. A. E. BENT,
Auditor of State,
Capitol Building.

Dear Sir—I have your inquiry concerning the right of the State Board of Land Commissioners to authorize vouchers to be drawn on the fund arising from the collection of fees in the Land Office.

"The State Board of Land Commissioners shall provide by rule for the amount of compensation of appraisers, which compensation shall be paid by the person or persons applying for the land."

3 Mills' (Rev. Sup.), section 3631-c.

This statute authorizes the board to direct the Register to collect from applicants for land, fees to cover the compensation of appraisers.

The Legislature has seen fit to make appropriations to cover the compensation, leaving it to the Land Board to take care of their expenses. This the board does by the collection of fees from applicants. There is no provision for the conversion of this money into the State treasury, but it is the simplest way to handle it, and when it is placed to the credit of the Land Board, it is subject to draft for the expenses of the appraisers.

"All expenses incurred by the State Board of Land Commissioners, or by any person employed by said board, in accordance with the provisions of this act, shall be paid by the State Treasurer on warrants drawn by the State Auditor on vouchers approved by the said board."

2 Mills', section 3648.

I do not think that the foregoing section is relied upon as authority for the payment of expenses incurred by the Land Board.

"The said board is hereby authorized to collect the following fees in connection with the business of the office, to wit: * * * The funds arising from the above fees shall be paid into the Land Commissioners' general fund, and may be used for the purpose

of encouraging immigration and such other purposes as the State Board of Land Commissioners may direct."

The latter section is sufficient authority for the Land Board to draw warrants upon the fund created by the collection of fees for the payment of any expenses incurred by the Land Board in pursuance of its business, as it may see fit. We pay most of the expenses of the appraisers and some clerks out of this fund, which is a legitimate use of the fund, without any appropriation from the Legislature.

Generally, I may say that any money that goes into the treasury can be paid out only upon appropriation by the Legislature, or under some statute like the one I have quoted, which authorizes some State board or State officer to draw upon a particular fund.

You have, in the State of Colorado, certain funds, such as the military poll tax fund, the commissioners' general fund, the boiler inspector's fund, and, possibly, some others. Express au thority is given to the certain offices to draw on these funds for the payment of definite expenses.

The mere fact that a voucher is drawn upon a fund and signed by certain officers will not justify you in paying it unless you are convinced that the voucher has been allowed by the officers designated by law to pass upon the same, and you should either require this action to appear in some suitable manner on the face of the voucher presented at your office, or you should consult the records and ascertain from them whethor or not its payment is legal. The mere signing of the voucher by certain officers does not furnish you with authority.

Vouchers coming from the State Land Board should appear to have been allowed by the board, and you should require that the vouchers show this in some suitable manner. There is no authority for the chairman to approve bills, and the recital on the face of the voucher that it has been so approved, amounts to nothing. What you want is evidence that it was considered and allowed by the board.

Yours very truly,

N. C. MILLER,
Attorney General.

STATE LANDS.

In the absence of collusion or fraud, the Register may postpone an advertised sale, by giving personal notice to those interested.

December 4, 1905.

HON. MARK G. WOODRUFF, Register,
State Board Land Commissioners,
State Capitol, Denver.

Dear Sir—Application was made to this office for an opinion as to the power of the Register to adjourn an advertised sale of school land.

It has been held that a sale may be postponed if it is done so for good reason, and without prejudice to the parties in interest. The decisions I have read relate to the sale of mortgaged property. The party in interest in such cases is ordinarily the owner or mortgagor. If the sale is conducted so as to obtain a fair and just price, it has been held that it may be postponed from the date advertised. Certain modes are pointed out to do this. It has been held that it is sufficient to wait until the day and hour of the sale, and then make the proclamation of the adjournment. In other cases it has been held that as soon as the necessity of adjourning the sale is discovered, a postscript shall be added to the advertisement published, changing the date and fixing a new one.

One or the other of these methods is followed. I would suggest that in case of adjournment both methods be adopted, and especially that the proclamation be made, because it is quite manifest that the purpose of the advertisement is to bring together those who desire to bid, and if a proclamation is made at the place and hour designated in the regular advertisement, no person can complain of not having had notice. All persons were to be there at the appointed hour and place, and if they learn that the sale is postponed, then they have notice, and if they are not there, they are not entitled to notice.

Wade on Law of Notice, section 1092.
Hosmer vs. Sergeant, 85 Am. Dec., 683.
Hoffman vs. Anthony, 75 Am. Dec., 701, and extended note.
Dexter vs. Shepherd, 117 Mass., 485.
Allen vs. Cole, 59 Am. Dec. 416 and extended note.

It will be observed that the legality of the postponement depends largely upon the absence of collusion or fraud. It is

therefore necessary to take the greatest precaution and see that the rights of all persons are preserved in the postponement, unless there is a statute prescribing the manner of adjourning the sale. In the absence of the statute, it will be apparent that the fairness of the proceeding is subject to investigation by a court, and for this very reason, the adjournment of a sale is to be avoided, if it is possible to do so, because it is never a good plan to pursue a course of action which is later subject to judicial inquiry.

Respectfully,

N. C. MILLER,
Attorney General.

STATE LANDS.

The formation of irrigation districts is rapidly appropriating all the surplus waters, and some prompt action must be taken by the People or else the State lands will soon be without water for irrigation.

April 15, 1905.

HON. MARK G. WOODRUFF, Register,
State Board of Land Commissioners,
Denver, Colorado.

Dear Sir—I have your letter of April 12th, the substantial part of which is the statement that a large number of irrigation districts have been organized in the State in localities where there are State lands, and that the waters will be appropriated in this way, and that unless some means is provided allowing state lands to participate, these lands will become merely grazing lands.

In reply I desire to say that I agree with you in this conclusion, and this is the contention I have made during the last two years.

I am of the opinion that the state can protect itself reasonably well by leasing the lands and providing in the lease that water rights secured for the lands may be made part consideration for the lease, and a provision inserted for the protection of the owner of the water right in case the lease is assigned or made to another person. In other words, the lease would provide that in case of a transfer the lessee shall receive not less than the cost of the water right from the assignee or new lessee.

This plan, however, offers no relief as to the organization of irrigation districts in which the ditches are built by assessment and taxation of all lands. It is an impossibility to tax lands belonging to the State for this purpose. The State could make

an appropriation, but I do not believe it will ever do so. It has not the revenue to do this, and it will not be permitted to use the school fund to pay its share of the cost of constructing ditches in irrigation districts.

There is no way in which the lands can be made the basis of security for the bonds so long as the lands belong to the State, and if the development of irrigation districts is retarded by the title remaining in the State, I see no relief except to sell them and thus subject them to the tax. In Montezuma county this is the especial objection, and it may interfere seriously with the sale of those bonds.

Yours truly,

N. C. MILLER,
Attorney General.

STATE TAXES—COLLECTION—FEES.

No expenses incurred in the assessment or collection of taxes levied for State purposes shall be paid by the State, but each county is responsible to the State for the full amount of such taxes.

August 19, 1905.

HON. A. E. BENT,
Auditor of State,
Denver, Colorado.

Dear Sir—I am in receipt of your communication, dated July 24th, enclosing letter addressed to you by C. W. Badgley, county treasurer, inquiring whether the State should pay statutory fees for the collection of taxes, levied for State purposes, which inquiry you refer to this office for advice thereon.

Mr. Badgley calls attention to section 1899, 3 Mills' (Rev.), page 516, which provides that the county treasurer shall charge and receive certain fees and commissions upon town, city and school taxes, also upon "all moneys received by him for taxes of every other kind, in counties of the first class, one per cent.; second class, one and one-half per cent.; third class, two per cent.; fourth class, three per cent.; fifth class, five per cent."

The Constitution of Colorado provides that "the compensation of all county and precinct officers shall be as provided by law."

Colorado Constitution, section 7, article XIV.

Said Constitution further provides:

"For the purpose of providing for and regulating the compensation of county and precinct officers, the General Assembly

shall by law classify the several counties of the State according to population, and shall grade and fix the compensation of the officers within the respective classes according to the population thereof. Such law shall establish scales of fees to be charged and collected by such of the county and precinct officers as may be designated therein for services to be performed by them respectively; and where salaries are provided, the same shall be payable only out of the fees actually collected in all cases where fees are prescribed. All fees, perquisities and emoluments above the amount of such salaries shall be paid into the county treasury."

Colorado Constitution, article XIV, section 15.

In accordance with the foregoing provisions of the Constitution, said classification has been made, and the fees for certain officers have been fixed by law.

While it is true the act of 1897, referred to by Mr. Badgley, provides certain fees for the county treasurer, it does not make the same payable by the State.

It is provided by section 10, chapter 134, Session Laws of 1899, that

"The county treasurers of the several counties of this State shall receive as their only compensation for their services, an annual salary, to be paid quarterly out of the fees, commissions and emoluments of their respective offices, and not otherwise, * * *."

The act in relation to public revenue, adopted March 22, 1902, expressly provides that "no expenses incurred in the assessment or collection of taxes shall be paid by the State, except as otherwise provided herein."

Session Laws, 1902, section 4, page 44.

I am unable to find any provision in said act which authorizes the payment of fees by the State for the collection of taxes. On the contrary, section 202 of said act makes each county responsible to the State for the full amount of the taxes levied for State purposes, except in case of erroneous assessments, or in cases where the same are found to be illegal, etc. (See Session Laws 1902, page 146.)

I understand that the uniform and long-established practice of your department, and also of the State Treasurer, has been against the payment of such fees by the State.

In conclusion, I would advise you that the State should not pay any statutory fees for the collection of taxes levied for State purposes.

Respectfully yours,

N. C. MILLER,
Attorney General.

By W. R. RAMSEY,
Assistant Attorney General.

STENOGRAPHER.

The position of stenographer to State Board of Charities and Corrections is not a statutory office, nor one held under contract for any definite period of time. Incumbent may be removed at any time.

October 6, 1905.

MR. C. E. HAGAR,
Secretary State Board of Charities and Corrections,
State Capitol Building.

Dear Sir—I am in receipt of your letter of the 4th inst., in regard to the claim of Mrs. Lucy I. Harrington for a balance due her on salary as stenographer for alleged services rendered the State Board of Charities and Corrections between the 3rd and 11th days of April, 1905.

From the records of your office I find that Mrs. Harrington was discharged by you on the 3rd day of April, 1905, and that she performed no further services for your department; that Mrs. A. G. Williams was duly appointed stenographer in her place, and assumed such duties on the following day; that this action on your part was in accordance with the authority vested in you, as secretary, by said board; and that, in addition, your action in this behalf was approved as of that date by said board at its regular meeting held on the 11th day of April, 1905, in the following language:

"That the appointment of Mrs. Anna G. Williams as clerk and stenographer for the biennial period, beginning April 1, 1905, vice Mrs. Lucy I. Harrington, removed, as made by Clarence E. Hagar, secretary, be approved."

The position of stenographer to the State Board of Charities and Corrections is not a statutory office or position, nor is it one held under contract for any definite time; but, on the contrary, such stenographer only retains the position, under the rules of your board, at the pleasure of the secretary. Since in this case Mrs. Harrington was removed by you on the 3rd day of April, 1905, and her successor was duly appointed and assumed her duties on the following day, and this action was approved by the board as of the respective dates, I am of the opinion that Mrs. Harrington has no just claim for compensation after the 3rd day of April, 1905, and your board would be exceeding its authority in allowing such claim; nor would the board have authority to deprive Mrs. Williams of the salary earned by her during the period between the 4th and 11th days of April, inclusive; and

certainly it would not be legal for it to pay two salaries for the services performed by one person.

Yours very truly,

N. C. MILLER,
Attorney General.

By I. B. MELVILLE,
Assistant Attorney General.

SALE UNDER TRUST DEED—EXPENSES OF.

The express purpose of a trust deed is to insure the interest named in the deed, and the payee is entitled to this amount without being obliged to sell the property at his own expense.

It is legal to stipulate for attorneys' fees in the trust deed.

Any reasonable rate of simple interest is allowed by statute; but not compound interest.

May 17, 1906.

MR. E. McPHEE, Treasurer,
Garfield County,
Glenwood Springs, Colorado.

Dear Sir—I am in receipt of your letter of May 15, asking, *first,* what charges are proper items of expense in connection with a sale of real estate under a trust deed securing the payment of a promissory note—a copy of the trust deed being enclosed; *second,* is a bill for services as attorney or agent in connection with said trust such a proper item; *third,* can any rate of simple interest, no matter how high, be named in said deed; and, *fourth,* should interest be allowed on unpaid interest?

In reply to your first question, I beg to say that the express purpose of a trust deed is to insure the payment of the principal sum named in the note, together with interest thereon, and the payee is entitled to such amount without being obliged to sell the property described in the trust deed at his own expense. It therefore follows that all reasonable provisions with this purpose in view may become proper items of expense.

As to the second question, one clause of the trust deed provides for the payment of all sums paid for attorneys' fees or for other purposes in connection with said trust or on account of any litigation in any way connected with the trust deed or the note secured thereby. Under this clause, I am of the opinion that any legitimate expense, including attorneys' fees, incurred in the sale of the property after it has become necessary to sell the same to

obtain the payment of the principal or interest, would be a proper item of expense.

As to the third question, section 2253 M. A. S., provides that:

"The parties to any bond, bill or promissory note, or other instrument of writing, may stipulate therein for the payment of a greater or higher rate of interest than eight per centum per annum, and any such stipulation may be enforced in any court of competent jurisdiction in this State."

Under this provision of the statute, at least any reasonable rate of interest—and our courts have not yet construed what rate might be considered unreasonable—could be collected, and certainly twenty-four per cent. per annum, under our decisions, is not an unreasonable rate.

As to the fourth question, interest upon unpaid interest is compound interest within the meaning of that term, and this, with but few exceptions, of which the trust deed in this instance, or the promissory note, secured thereby, is not one, is not allowed by our courts.

Respectfully submitted,

N. C. MILLER,
Attorney General.

By I. B. MELVILLE,
Assistant Attorney General.

WATER DISTRICTS.

The counties of Adams, Douglas, Arapahoe, Jefferson and the City and County of Denver constitute Water District No. 8, and each is liable for one-fifth of the expenses of water commissioner of said district.

July 10, 1905.

HON. T. W. JAYCOX,
State Engineer,
Denver, Colorado.

Dear Sir—In reply to your inquiry as to what counties should pay the Water Commissioner of Water District No. 8, I beg to say: 3 Mills' (Rev.), 2318, provides that:

"Water District No. 8 shall consist of all lands irrigated by ditches taking water from Cherry creek, Plum creek and the Platte river and their tributaries, except Bear creek above Water District No. 2 and below the forks of the north and south

branches of the South Platte river, and including all lands and ditches in Douglas county."

From an irrigation map of this portion of the State, I find that lands in the counties of Adams, Arapahoe, Douglas and Jefferson and the City and County of Denver are irrigated from these waters.

Therefore, according to County Commissioners vs. Locke, 2 Colorado App., 508, each of these five counties should pay one-fifth of the amount due the commissioner of this water district for his services.

Yours truly,

N. C. MILLER,
Attorney General.

By I. B. MELVILLE,
Assistant Attorney General.

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